Nos. 75-510 & 75-545

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In the Supreme Court of the United States

OCTOBER TERM, 1975

FLINT RIDGE DEVELOPMENT COMPANY, AND CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,
Petitioners,

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS

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I
STATEMENT OF FACTS

The Web of the Caddis Fly

The Illinois River Basin is a community of interdependent and interacting parts. It is, without question, a unique and fragile ecosystem of the kind Congress had

in mind when it said in NEPA:

> "The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, *declares that it is the continuing policy of the Federal Government, in* cooperation with State and local governments, and other concerned public and private organizations, *to use all practicable means and measures,* including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." (emp. added)

Into the life stream of this ecosystem there has been introduced a foreign body of a luxury, leisure-home development—an intrusion the basin cannot withstand. This type of infection is quite widespread already. Witness its effects in the States of California, Colorado, Arizona, New Mexico and Florida.[1] Twenty-five thousand people

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[1] *5th Annual Report of C.E.Q.*, App. # D, p. 21-26. This material is taken from a study on leisure homes undertaken by the American Society of Planning Officials for C.E.Q. and H.U.D.

have already expressed their disapproval by requesting protection for the river.[2]

The developer and the Federal Government have displayed a complete lack of candor with the Court in their discussion of the actual and potential adverse environmental effects of these expensive and wholly unnecessary pleasure domes.

There is more to environmental degradation than 3,000 septic tanks as even a purblind examination of the record will reveal.

> "Of course, to look at it in the light of if it were just the sewerage that was before the Court is one thing, but there is more before the Court than the question of sewage disposal, septic tank operation, and the soil in which the septic tanks are going to flow.
>
> * * *
>
> "Pollution will destroy not only the river but will destroy the very thing that Flint Ridge is trying to do, and that is to sell lots and prepare nice, decent, clean places for people to live.
>
> "Well, I could go on for a long time because the

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[2] HUD has incorporated a test of *controversy* into its own procedures for determining when to prepare impact statements and this constitutes an admission that any of its decisions which create substantial controversy as to the nature of effect of its action is a major federal action significantly affecting the quality of the human environment. Handbook 1390.1 Ch. 5a(3). See *Silva v. Romney* (D. Mass., 1972) 342 F. Supp. 783 which holds that a federal agency is bound by its own regulations, and generally *Service v. Dulles*, (1957) 354 U.S. 363; *Vitarelli v. Seaton* (1959) 359 U.S. 535.

evidence in this case is very impressive to the Court." (R. p. 552-553, comments by Judge Bohanon)

The Government and the developer seem indifferent to the biotic pyramid—the delicate balance of nature.

The fragility of the Illinois River ecosystem and the destructive environmental effects on that system by a development can be demonstrated, and was, in a number of ways.

Consider for the moment just one effect of the development; and that is, sedimentation (which Petitioners ignore in their account of the facts). Sediment does extensive damage to the aquatic life in a stream of the quality of the Illinois River. (R. p. 253) The basic building block of that aquatic life is a tiny, but very important, organism called the Web-spinning Caddis Fly. It is a little creature that lives in the river and spins a web to catch its food—fiber plankton. The web does more. It knits many of the little rocks in the stream to each other and to larger rocks. By tying small rocks to larger rocks with its web, the Caddis Fly single-handedly maintains channel stability. Its greatest enemy is sediment. It cannot cannot catch its food with a muddy web.

Even something as apparently innocuous as a road crossing causes the Caddis Fly population to drop off significantly. In fact, existing sediment in the Illinois River has already caused a drop in the Caddis Fly

population and further development will increase this effect to catastrophic proportions. This will result in a loss of channel stability as well as the pool and ripple nature of the river.

Once the stability of the river is altered, one, but not all, of its effects is a destruction of fish habitat and stream quality. Loss of stability also changes the entire nature of the river because loose gravel, no longer bound together by the healthy work of the Caddis Fly, will be transported down the stream to the first dam. On this journey it will stir up even more sediment thereby dramatically increasing the destruction inflicted upon plant and animal life (R. p. 253-256).

There is no dispute that the development will cut roads, clear land and cause sedimentation notwithstanding even the most sublimely effective septic tank system. That the Petitioners are playing false with the facts in this case is obvious.

The truth is the Flint Ridge development will actually or potentially result in the complete destruction of the Illinois River Basin. *There will be substantial effects on the quality of the human environment in all of its aspects.* The river is a State designated scenic river and is included for study in the National Wild and Scenic Rivers System. The evidence presented at trial clearly established, *and it is uncontroverted on appeal to this*

very day, that as a result of th's development *there will be adverse effects upon the Illinois River and its Basin and also upon the course and depth of the river, its tributaries and drainage area, the plant life, wildlife habitats, fish and wildlife, soils, air, esthetics of the area and upon the socio-economic conditions of the area, including such matters as health, hospital care and facilities, roads and highways, schools, police and fire protection (Trial Court's Finding No. 14, R. p. 689).*

But there is a better way—even with the existence of the development. Many of the problems could be resolved and consequences mitigated. NEPA is not a paper-pushing exercise when undertaken in good faith. Witness the testimony of the various State officials who would be called upon to rectify the environmental harm. Administrators from Planning Offices, Recreational and Pollution Control Agencies all stated that the preparation of an environmental impact statement would be of use and value to them in the performance of their duties [R. p. 208 (pollution control), R. p. 281 (planning), R. p. 246 (recreation)].

The Federal Government simply refuses to comply with the National Environmental Policy Act (NEPA)—a serious dereliction of duty according to the Trial Court (Finding No. 13, R. p. 689).

It should be remembered that in all things this is

an action brought by the people against administrative officials of the Federal Government who refused to comply with Federal Law. This action was brought *prior* to the effective date of the filing under the Interstate Land Sales Act in this case; and, notwithstanding the bringing of this action, the environmental degradation proven beyond any doubt, and the clear mandate contained in the National Environmental Policy Act, together with its high principles, the Federal Government adamantly, negligently refuses to comply with this law.

Why is all of this important? Because the statute (NEPA) refers to major federal action *significantly affecting the quality of the human environment.* The facts in this instance must be taken as an actual and potential occurrence in the time and space of an entire river system; not just today, but tomorrow as well.

We asked the Government to prepare an adequate environmental information base before it acted to permit the developer to sell lots in interstate commerce. *It is foolish to assume that if the developer is not permitted to sell in interstate commerce that the environmental degradation will occur in any event. It is not only foolish but absurd.* Equally obvious is the fact that the 3.5 million dollars was not spent to degrade the environment. Some must have been spent for land acquisition, the massive advertising campaign and overhead expenses.

The duty, imposed by the Congressional mandate, as revealed in the Legislative history of NEPA, HUD's own regulations under NEPA and the Interstate Land Sales Act and unanimous judicial interpretation of NEPA has been ignored. The Trial Court correctly summed this up as a serious dereliction of duty not only under the law but to the people whom the officialdom of HUD is supposed to serve.

When viewed in the total context there is no other conclusion than that reached by the Courts below.

II
ISSUES

The Government and the developer attempt, for the first time, to interject issues totally foreign to the facts and record. Allegations of what might, may or could, occur are no part of this case.

Therefore, Respondents submit that the issues presented to the Trial Court and to the Circuit Court of Appeals, and which were addressed and ruled upon by the respective courts, are as follows:

(1) Whether *under the facts* of *this* case—facts which conclusively demonstrate significant actual and potential environmental degradation—the Department of Housing and Urban Development must comply with the National Environmental Policy Act and prepare an environmental

impact statement *on this particular interstate land sales filing.*

(2) Whether HUD is exempt from the standards and mandates of NEPA.

(3) Whether HUD is bound by its own rules, policies and procedures.

This Court should not be fooled by the blasé and speculative approach to this case of the government and of the developers.

III
SUMMARY OF ARGUMENT

Our argument will discuss disclosure laws including NEPA and the moral imagination which produced and welds them together as a part of an overall pattern.

The legislative history of NEPA instructs that NEPA is to apply to all Federal agencies and all Federal officials when they take action or permit others to take action which will affect the environment. The aim of NEPA as enacted by Congress was to force the Federal agencies, the neglectful stewards, to pay attention to the environmental consequences of their decisions, and it enlarged their mandates to do so.

At a minimum Congress demanded a "hard look" and where necessary preparation of an impact statement (albeit not in all cases as HUD sweepingly suggests).

That is why the District Courts and the Courts of Appeal of The United States have ruled that NEPA applies to all federal actions which have a reasonably substantial relationship to the quality of the human environment, whether that action consists of direct federal impact on the environment, or actions taken by other persons which will have a substantial environmental impact, and for which federal permission is required, or which sets into motion the environmental degradation.

Major federal action is a mixed question of law and fact. One test for major federal action is whether, as a result of federal action, a private party is permitted to undertake environmental degradation; and, if so, such action is major.

It does not foster the purposes of NEPA or make any sense to find federal action minor when the environmental effects of agency action, or action it permits private parties to take, are substantial.

The argument that the statutory operating authority of ILSA prohibits or makes compliance with NEPA impossible is unsupportable in fact and in law.

Superimposed upon the grant of authority to HUD to regulate interstate land sales is the Congressional mandate contained in NEPA and this gives specific content to HUD's authority under ILSA to require dis-

closure of environmental information in the public interest in the form of an environmental impact statement. ILSA and NEPA are full disclosure statutes which complement each other.

HUD cannot at this juncture raise this issue, since it is in violation of Section 103 of NEPA. HUD has failed for five years to ascertain the existence of any deficiencies or inconsistencies in ILSA and to ask Congress for revision.

In an argument totally devoid of support in the record, in the law or in real life, HUD whines about administrative burden. One might suppose that Congress has no power to give tasks to federal bureaucracies. Nevertheless, there is no crushing administrative burden as a result of this case or any other. Nevertheless, the National Environmental Policy Act has for its goals higher values than administrative ease and, in any event, this is a matter which should be addressed to Congress.

IV

ARGUMENT

A

The Moral Imagination and Disclosure Laws

NEPA is more than just an idealistic, if belated, effort to force all Federal agencies to pay attention to long-ignored environmental factors before taking any action, no matter how slight, which may significantly

affect the human environment. The Act is Congressional recognition of the "ecological necessity" for establishing an *ethical* relationship between men and the land.[3] NEPA acknowledges and approves the view that people, land, and the living things on the land, are a community of inseparable and interdependent parts. It rejects the destructive notion that our relationship to the land is solely economic, bestowing privileges on us but involving no obligations. The promontory of truth in NEPA is that land is not just property subject to disposal by expediency. As the drafters of NEPA realized, people, soil, water, plants and animals are a community which deserve both love and respect. It is an ecological body of the one and the many, and that many includes both the individual and the government. This means that questions of right and wrong must be considered by Federal agency decision-makers when their actions may affect this community.

Conservation has been defined as a state of harmony between men and land.[4] The moral imagination which produced NEPA declares that the purpose of the Act is to "encourage productive and enjoyable harmony between man and his environment," 42 U.S.C. § 4321, and "to create and maintain conditions under which man and nature can exist in productive harmony." 42 U.S.C.

[3]Aldo Leopold, *A Sand County Almanac*, p. 203.

[4] Ibid. p. 207.

§ 4331. These words establish not only the ethical content of the Act, but knowledge that abuse of the environment is not only wrong, it is *uneconomic.* The ethical base of NEPA is not the product of some environmentalist's sentimental view of nature with no concept of economic reality. In fact, the more myopic view rests with those who advocate enhancement of personal resources according to unrestricted self-interest no matter what the cost. It is from this point of bias that the *ad hominem* epithet "land use" is thrown at any attempt to vindicate the public interest.

This cheap polemic abases the questions raised here and has nothing to do with the extension of ethic to federal actions which may affect the quality of our environment. This absurd and angry argument also ignores the fact that long ago *laissez faire* economics was supplanted, in major part, by "cooperative mechanisms with an ethical content".[5]

What then is NEPA's land ethic? It is a method of guiding us when we encounter ecological circumstances that are so new or involved or which have such delayed consequences that the correct choice to make in dealing with them is not readily ascertainable to the average man. We need information, study, and an interdisciplinary attack of the problem to arrive at a solution which is

[5]Aldo Leopold, *A Sand County Almanac*, p. 202.

ecologically, economically and technologically sound. With facts provided for both the agencies and the Congress, plus state and local governments, we can build a reservoir of community knowledge and intuitive response to protect our community for generations to come. Why then do we have such obdurate refusals on the part of the Government to take an "ecological" look before it acts?

The development of ethic is actually a definitive part of ecological evolution. Since ecology is the study of the relationship of organisms to each other and to their environment and their total interaction, it includes the relationship of individual to individual, individual to society, and the perception of the natural processes by which the land and the living things on it continue their existence by working out modes of cooperation.

The ethical sequence at work in the enactment of NEPA was preceded by earlier extensions in such laws as the Securities Act of 1933 and ILSA.

The mode of cooperation selected to counter the abuses in the securities industries in the 1930's was the enactment of federal regulations to restore investor confidence and to protect the public and prevent economic extirpation. The SEC was given broad rule-making power to require disclosure of information in the public interest, and, as we have recently discovered, NEPA gives specific

content to the SEC's power to require disclosure of specific information; in this instance, environmental facts in the public interest. *N.R.D.C. v. S.E.C.* (D.C.D.C., 1974) 389 F. Supp. 689. There is no doubt that the basic mandate of the SEC and of HUD in the administration of ILSA was expanded by the later enactment of NEPA, and even a cursory glance at the legislative history involved here shows this to be true.

ILSA is also a full disclosure law. It was patterned after the Securities Act of 1933, and in fact the first plan was to have the registration statement of the developer filed with the SEC., 113 Cong. Rec. 315-316 (January 12, 1967). Its passage was also stimulated by the interest of many planners and journalists concerned about "land use" in their home state, 113 Cong. Rec. 316 (January 12, 1967). Senator Mondale described it as a consumer protection statute placing an affirmative responsibility on one who sells real estate in interstate commerce to affirmatively tell all of the facts, the bad as well as the good, so the purchaser can make a rational judgment, 113 Cong. Rec. 317 (January 12, 1967).

Ethic was at work in the minds of the Congress at the time of the passage of ILSA. We need only to examine 21 *Case Western Reserve Law Review* at p. 9 to see the ethical sequence at work:

"A third factor troubling the legislative conscience

was the land use planning problem raised by the ill-controlled marketing of thousands upon thousands of subdivided parcels, many of which were unfit for habitation either presently or in the near future. Where a large tract of marginal land is subdivided into hundreds of small lots by means of the unimaginative grid pattern, a chain reaction of planning problems is triggered. A tremendous demand is immediately imposed upon local government for the speedy development of proper drainage, sanitation, and roads, together with adequate public utilities and facilities such as schools, police and fire protection. But the area generally does not have a tax base sufficient to support such rapid expansion and improvement. This unfortunate state of affairs may lead to haphazard and patchwork community growth. It could also stymie development altogether."[6]

"A situation therefore can develop which precludes use of the land by the small parcel owners; prohibits reassembly for either a private or public purpose; and, indeed, makes it impractical even for agricultural pursuits." See Hearings Before Sub-committee on Fraud & Misrepresentation Affecting the Elderly, 89th Cong., 2nd Sess. (1964) 157-158.

The CEQ-HUD study commissioned by the Department of Housing and Urban Development and published

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[6]*Full Disclosure Comes Down to Earth*, Ronald J. Coffey & James Welch, *21 Case Western Reserve Law Review*, p. 9. See also 1965 Rep. 40, Hearings on S.B. 2672, 89th Cong., 2nd Sess., p. 44 (1966).

in 1974 indicates many of the same problems exist with regard to leisure or second home developments. It is disingenuous to argue that ILSA and NEPA are not compatible, when the CEQ-HUD study could have had no other purpose than to examine the basic environmental effects of leisure home developments on ecologically fragile areas. The CEQ-HUD study also details a myriad of ecological and economic problems arising from leisure home development. What takes place is "instant urbanization of rural communities" where local governments have little or no experience in coping with large developments and few, if any, land use controls or regulatory bodies to deal with them. Another, as yet unsolved problem, is the conflict between such developments and public recreation goals. The Illinois River Basin is now, and will be in the future, the primary recreation area of Northeastern Oklahoma. It is now easy to see why one of the specific products of the CEQ-HUD study was an *impact evaluation handbook* for use by various agencies and governments in handling the cultural shock of the second-home standard of living expansion. See C.E.Q. 5th Annual Report to Congress at 26, 490. Now is the time for candor, and unless tortured logic is employed, it is obvious that the evolving moral imagination which produced the SEC and ILSA also created NEPA.

As our consciousness of ourselves and our land as

a community grows, so should our law grow. All three of these Acts require full disclosure of information to vouchsafe rational choice, whether that choice is to be made by the individual, or society through its appointed, but sometimes balky servants, the Federal agencies.

The Securities Act of 1933, ILSA and NEPA are not discrete entities enacted in a vacuum. They were, and are, stages in an evolutionary process which, in its own unique way, evolved the instincts and philosophies that produced three laws that fit together like preconceived parts of a plan not yet fully revealed, but whose outline may be seen by any who are willing to listen to the voice of conscience and take a "hard look".

B

The Neglectful Steward
A Legislative History of NEPA

We have briefly outlined the philosophy which produces legislation designed to protect the public interest. We also explained how many of these acts are interrelated and are grounded in national policy. The Petitioners make the dual argument that the activity involved in this case is not "major federal action significantly affecting the quality of the human environment" and that there is an irreconcilable conflict between the mandate of the Interstate Land Sales Act and the mandate of the

National Environmental Policy Act. One need only to peruse the legislative history of the National Environmental Policy Act to explode each of these arguments.[7]

The Courts have instructed us that:

"In analyzing Appellants' contentions, *we are not restricted to the bare wording of section 102 of the NEPA. Sections of statutes should not be considered out of context and in interpreting legislation, Courts will examine the entire statute, including its objects and policies. Richards v. U.S.*, 369 U.S. 1, 82 S. Ct. 585, 7 L. Ed.2d 492 (1961).

'[C]ourts will construe the details of an act in conformity with its dominating general purpose, will read text in light of context, and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.'

"S.E.C. v. C.M. Joiner Leasing Corporation, 320 U.S. 344, 350-351, 64 S. Ct. 120, 123, 88 L. Ed 88 (1943). See also, Cornett-Lewis Coal Company v. Commissioner Internal Revenue, 141 F.2d 1000, 1004 (6 Cir., 1944)."

Environmental Defense Fund v. Tennessee Valley Authority (C.A. 6, 1972) 468 F.2d 1164, 1173.

Congress had five objectives in mind by passing NEPA. It (1) enlarged the Federal agencies' mandate and established a national environmental policy; (2) established specific "action-forcing" procedures to carry

[7] For an extensive analysis of the Legislative History see Anderson, *NEPA in the Courts*.

out the policy; (3) provided a mechanism to develop indices of environmental quality; (4) established the Council on Environmental Quality (CEQ); and (5) provided for reports to be made to Congress concerning the progress toward accomplishing the goals of NEPA.

We are here concerned with the first three of these objectives.

What is the purpose of the National Environmental Policy Act as announced by Congress? "The Act, after all, is a National Environmental *Policy* Act. Its legislative history is replete with broad language pointing out large areas of Federal environmental impact, the control of which would require major changes in government decision making." Comment, ***NEPA & Federal Policy Making: NRDC v. Morton, Legislative Impact Statements, and Better NEPA Procedures,*** 2 E.L.R. 1038, 1040.

The purpose of the Act as announced by Congress is:

> "The purpose of S. 1075, the National Environmental Policy Act of 1969, is to establish, by Congressional action, a national policy to guide Federal activities which are involved with, or related to, the management of the environment or which have an impact on the quality of the human environment." 115 Cong. Rec.—Senate July 10, 1969, 19008, 19010.

In addition to creating a national policy for the environment, the Act:

> " . . . provides a considered Congressional statement

> of national goals and purposes for the management and preservation of the quality of America's future environment. *The bill directs that all Federal agencies conduct their activities in accordance with these goals and provides action-forcing procedures to insure that these goals and principles are observed. The bill specifically provides that its provisions are supplemental to the existing mandates and authorizations of all Federal agencies. This constitutes a statutory enlargement of the responsibilities and the concerns of all instrumentalities of the Federal Government."* 115 Cong. Rec.—Senate July 10, 1969, 19008, 19009; (emp. added).

See also comments of Senator Jackson, 115 Cong. Rec. at 40416 (December 20, 1969). We may conclude that, if nothing else, the Act established a policy of the highest order. Part of the reason for this policy is given in an introduction to the report promulgated by the Senate Committee on Interior and Insular Affairs:

> "It is the unanimous view of the members of the Interior and Insular Affairs Committee that our Nation's present state of knowledge, our established public policies, and our existing governmental institutions are not adequate to deal with the growing environmental problems and crises the Nation faces.
>
> *"The inadequacy of present knowledge, policies, and institutions is reflected in our Nation's history, in our national attitudes, and in our contemporary life. We see increasing evidence of this inadequacy all around us: haphazard urban and suburban growth; crowding, congestion, and conditions within our central cities*

which result in civil unrest and detract from man's social and psychological well-being; the loss of valuable open spaces; inconsistent and, often incoherent rural and urban land-use policies; critical air and water pollution problems; diminishing recreational opportunity; continuing soil erosion; the degradation of unique ecosystems; needless deforestation; the decline and extinction of fish and wildlife species; faltering and poorly designed transportation systems; poor architectural design and ugliness in public and private structures; rising levels of noise; the continued proliferation of pesticides and chemicals without adequate consideration of the consequences; radiation hazards; thermal pollution; and increasingly ugly landscape cluttered with billboards, powerlines and junkyards; and many, many other environmental quality problems.

"Traditional national policies and programs were not designed to achieve these conditions. But they were not designed to avoid them either. *And, as a result, they were not avoided in the past. They are not being avoided today.*"

* * *

"As a result of this failure to formulate a comprehensive national policy, environmental decisionmaking largely continues to proceed as it has in the past. Policy is established by default and inaction. *Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.*

"Today it is clear that we cannot continue on this course. Our natural resources—our air, water, and land—are not unlimited. We no longer have the margins for error that we once enjoyed. The ultimate issue posed by shortsighted, conflicting, and often selfish demands and pressures upon the finite resources of the earth are clear."

* * *

"To provide a basis for advancing the public interest, a congressional statement is required of the evolving national objectives of managing our physical surroundings, our land, air, water, open space, and other natural resources and environmental amenities." (emp. added) 115 Cong. Rec. 19009-10 (July 10, 1969).

If the goals and principles were to be effective, three things had to occur. First, *every* Federal agency had to be governed by the Act. Second, "action-forcing" procedures had to be adopted. Third, the language had to be such that *no* agency could "utilize an excessively narrow construction of its existing statutory authorization to avoid compliance."

As passed, NEPA accomplishes all three objectives. Nor have the Courts interfered with the accomplishment of these objectives; but on the contrary, have reinforced the Congressional intent by decisive judical action. Congress obviously envisioned the necessity to overcome the bureaucratic inertia.

It is clear that by the time the Senate passed the bill in July of 1969 that the legislation would *add to* existing mandates of Federal agencies. This includes agencies which had earlier argued that they had no authority to consider environmental effects or their actions. See, *Hearings on S. 1075, S. 237 and S. 1752 Before the Senate Committee on Interior and Insular Affairs,* 91st Cong., 1st Sess. at 116.

As early as July of 1969, it was the intent of Congress that rather than changing each agency's operating statutes it would be better to "lay down a general requirement that would be applicable to *all agencies* that have responsibilities that affect the environmental rather than trying to go through agency by agency." See *Hearings on S. 1075, S. 237 and S. 1752 Before the Senate Committee on Interior and Insular Affairs,* 91st Cong., 1st Sess. at 116-17.

As further support for this position, we see that immediately after the Senate hearings in April of 1969, Senator Jackson directed the Interior Committee staff to draft an expanded statement of national environmental management goals, to grant new authority to Federal agencies "which at the present time, have no mandate or responsibility for the management and protection of the human environment." See, *Hearings on S. 1975, S. 237 and S. 1752 Before the Senate Committee on*

Interior and Insular Affairs, 91st Cong., 1st Sess. at 206. In this way "no agency would then be able to maintain that it has no mandate or no requirement to consider the environmental consequences of its action." See, *Hearings, on S. 1075, S. 237 and S. 1752 Before the Senate Committee on Interior and Insular Affairs,* 91st Cong., 1st Sess. The result was that the National Environmental Policy Act *"would provide all agencies and all Federal officials with a legislative mandate and a responsibility to consider the consequences of their actions on the environment. This would be true of the licensing functions of any independent agency as well as the ongoing activities of the regular Federal agencies."* 115 Cong. Rec. 19012 (July 10, 1969).

One needs only to read the language of Senator Jackson to conclude that the National Environmental Policy Act superimposes additional duties and responsibilities upon all existing Federal agencies of whatever kind or category. "This constitutes a *statutory enlargement* of the responsibilities and concerns of *all instrumentalities* of the Federal Government." 115 Cong. Rec. —Senate (July 10, 1969) 19009. And on December 20, 1969 he said, "Taken together, the provisions of section 102 directs *any* Federal agency *which takes action* that it must take into account environmental management and environmental quality considerations." (emp. added) 115

Cong. Rec.—Senate 40416 (December 20, 1969).

From the beginning it is obvious that Congress intended to interrupt business-as-usual. NEPA was to be an Act to have immediate and substantial effect on ongoing governmental operations.

When Senator Jackson first introduced S. 1075, Professor Lynton K. Caldwell spoke of the need for "action-forcing" provisions and said:

> "Let me give you just a few illustrations of what I mean, by policy forcing or operational aspect of a policy statement. For example, it seems to me that a statement of policy by the Congress should at least consider measures to require the Federal agencies, in submitted proposals, to contain within the proposals an evaluation of the effect of these proposals upon the state of the environment, that in the licensing procedures of the various agencies such as the Atomic Energy Commission or the Federal Power Commission or the Federal Aviation Agency there should also be, to the extent that there may not now exist fully or adequately, certain requirements with respect to environmental protection, that the Bureau of the Budget should be authorized and directed to particularly scrutinize administrative action and planning with respect to the impact of legislative proposals, and particularly public works proposals on the environment."

In response to this statement, Senator Jackson concurred and said:

> "Well, Dr. Caldwell, that is an excellent presentation. . . . I have been concerned with the inadequacy of the policy declaration in the bill that I introduced. Obviously, this is not enough . . . I agree with you that realistically what is needed in restructuring the governmental side of this problem is to legislatively create those situations that will bring about an *action-forcing* procedure that departments must comply with. Otherwise, these lofty declarations are nothing more than that." Hearings on S. 1075 Senate Committee on Interior and Insular Affairs at 116.

Senator Jackson then turned to the manner in which such a "restructuring" could be accomplished.

> "I am wondering if we might not broaden the policy provision in the bill so as to lay down a general requirement that would be applicable to all agencies that have responsibilities that affect the environment rather than trying to go through agency by agency.
>
> "I think the immediate example . . . is that the Atomic Energy Commission, in granting permits or licenses in connection with nuclear powerplants, *should be required to make an environmental finding.*
>
> "This, of course, might be applicable to the Federal Power Commission. One can go on down the list of agencies. I am trying to avoid a recodification of all of the statutes. . . .
>
> 5] . . . If we try to go through all of the agencies that are now exercising certain responsibilities pursuant to law in which there is no environmental policy or standard laid out, we could be engaged in a recodification of the Federal statutes for a long, long time." ID at 117.

In order to implement this policy, Congress created

certain "action-forcing" procedures. They are outlined in Section 102 of the Act and the duties imposed by Section 102 are to be complied with fully by every agency. 115 Cong. Rec. 39703 (December 17, 1969).

From the report on the hearings conducted by the Senate Committee on Interior and Insular Affairs we learn that Congress was not engaging in rhetoric when it stated the goals and principles of NEPA.

> "A statement of national policy for the environment—like other major policy declarations—is in large measure concerned with principle rather than detail; with an expression of broad national goals rather than narrow and specific procedures for implementation. But, if goals and principles are to be effective, they must be capable of being applied in action. S. 1075 thus incorporates certain 'action-forcing' provisions and procedures which are designed to assure that all Federal agencies plan and work toward meeting the challenge of a better environment." 115 Cong. Rec. 19010-11 (July 10, 1969).

The strength of the Congressional intent behind these "action-forcing" procedures is apparent from the conference report on NEPA reproduced at 115 Cong. Rec. 39703 (December 17, 1969). Since we deal primarily with the phrase "to the fullest extent possible," insofar as compliance with the Act is concerned, it is important to know how both the House and the Senate agreed as to the meaning and intent of this phrase.

> "As noted above, the conference substitute provides that the phrase 'to the fullest extent possible' applies with respect to those actions which Congress authorizes and directs to be done under both clauses (1) and (2) of section 102 [in the Senate bill, the phrase applied only to the directive in clause (1)]. In accepting this change to section 102 (and also to the provisions of section 102), the House conferees agreed to delete section 9 of the House amendment from the conference substitute. Section 9 of the House amendment provided that 'nothing in this Act shall increase, decrease or change any responsibility or authority of any Federal officials or agency created by other provision of law.' In *receding* from this House provision in favor of the less restrictive provision 'to the fullest extent possible', the House conferees are of the view that the new language does not in any way limit the Congressional authorization and directive to all agencies of the Federal Government set out in subparagraphs (A) through (H) of clause (2) of section 102. *The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in such subparagraphs (A) through (H) unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible.* If such is found to be the case, then compliance with the particular directive is not immediately required. However, as to other activities of that agency, compliance is required. *Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section*

102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance." (emp. added)

"Thus it is apparent that this phrase, rather than qualifying the obligation of Federal agencies to comply with the requirements in section 102, constitutes an injunction to all Federal agencies to exert utmost efforts to apply NEPA to their own operations." *Ely v. Velde,* (C.A. 4, 1971) 451 F.2d 1130; *E.D.F. v. T.V.A.,* (C.A. 6, 1972) 468 F.2d 1164, 1176; *Calvert Cliffs Coordinating Committee v. A.E.C.,* (C.A.D.C., 1971) 449 F.2d 1109.

At this juncture we find that Congress has, in the strongest possible language, provided for policy, for a mechanism to implement that policy, and a directive to utilize that mechanism.

What are the environmental considerations that must be considered? Again, the Congressional history instructs us.

> "We see increasing evidence of this inadequacy all around us: . . . *the loss of valuable open spaces; inconsistent and often, incoherent rural and urban land-use policies; critical air and water pollution problems; diminishing recreational opportunity; continuing soil erosion; the degradation of unique ecosystems;* needless deforestation; *the decline and extinction of fish and wildlife species;* 115 Cong. Rec. 40417 (December 20, 1969) [8]

The language of the legislative history indicates that Congress intended that the "action-forcing" provisions of NEPA should apply to *all* Federal actions which affect the quality of the human environment.

If the Federal action has the significant effect, Congress means for the Federal agencies to evaluate that effect in light of the requirements of section 102(C) of NEPA. It is obvious that it is the "significant effect" which requires the evaluation and which establishes the base line definition of "major federal action." The legislative history is clear on this point. " . . . each agency which proposes . . . *any other major federal action* shall make a detailed statement as to whether the proposal would have a significant effect upon the quality of the human environment. *If the proposal is considered to have such a significant effect, then the recommendation or report on the proposal must include a detailed statement by the responsible official . . .* " (emp. added) 115 Cong. Rec.—Senate 40420 (December 20, 1969).

The action in this case was the *decision* to allow the

[8] Each of these, and others, were proven in the trial. HUD does *not* dispute the significant effect on the quality of the human environment.

developer to proceed in interstate commerce by the issuance of a letter of compliance with ILSA. That this decision has significant effect upon the environment is uncontroverted.

Petitioners cast doubt upon the intent of Congress with regard to which Federal actions require an environmental impact statement. It is an axiomatic rule of law that whenever there is doubt about the meaning of a particular statutory term courts *must* construe that term to give effect to the intent of Congress. *E.D.F. v. T.V.A.* (C.A. 6, 1972) 468 F.2d 1164. Construing the Act as a whole, we see the terms "major" and "significantly affecting" seem to have been used more for emphasis rather than as limitations. In all events, it makes little sense to call a Federal action minor when its effects are admittedly major. *Minnesota Public Interest Research Group v. Butz,* (C.A. 8, 1974) 498 F.2d 1314.

Similar Congressional adamance is reflected in the Congressional History of Section 103 of the National Environmental Policy Act. For HUD to state, as they do in this case, that NEPA does not apply to Interstate Land Sales filings, is to admit violation of the law.

> "This section is based upon a provision of the Senate bill [section 102(f)] not in the House amendment. This section, as agreed to by the conferees, provides that all agencies of the Federal Govern-

> ment shall review their 'present statutory authority, administrative regulations, and current policies and procedures to determine whether there are any deficiencies and inconsistencies therein which prohibit full compliance with the purpose and provisions' of the bill. *If an agency finds such deficiencies or inconsistencies, it is required under this section to propose to the President not later than July 1, 1971, such measures as may be necessary to bring its authority and policies into conformity with the intent, purposes, and procedures of the bill.* Section 103 thereby provides a mechanism which shall be utilized by all Federal agencies (1) to ascertain whether there is any provision in their statutory authority which clearly precludes full compliance with the bill and (2) if such is found, to recommend changes in their statutory authority which will enable full compliance with the bill. *In conducting the review noted above, it is the understanding of the conferees that an agency shall not construe its existing authority in an unduly narrow manner. Rather, the intent of the conferees is that all Federal agencies shall comply with the provisions of section 102 'to the fullest extent possible,' unless, of course, there is found to be a clear conflict between its existing statutory authority and the bill.*" (emp. added) 115 Cong. Rec. 39703 (Dec. 17, 1969)

The Executive Branch of this Government comes before this Court brim full of deceit.[9] Since the enactment of NEPA, the Housing and Urban Development Depart-

[9]Can anyone really explain H.U.D.'s persistent refusal to comply voluntarily with NEPA? For a revealing discussion on this point see Dorschlag and Junger, *H.U.D. and N.E.P.A.* 58 Iowa L. Rev. 805 at p. 836 and 890.

ment has enacted certain guidelines under its Handbook 1390.1 which clearly and adequately demonstrate that it considers filings under ILSA to be applicable to NEPA. (Reproduced as Appendix A to this Brief.) NEPA itself has been amended and no request was put forth by HUD to exempt its ILSA activities from NEPA. In fact, ILSA has been amended *since this lawsuit was filed* and again there has been no request for exemption or modification of the broad NEPA mandates.

Section 103 was originally a portion of subsection 102(f) of Senate Bill 1075. As it has emerged, it is clear that the section 103 "spells out what clearly was intended in the first place: the key words are 'deficiencies and inconsistences which *prohibit.*'" This has been interpreted to mean that the changes add to rather than detract from the theory of a present jurisdictional grant. Hanks & Hanks, *An Environmental Bill of Rights: The Citizens' Suit and the National Environmental Policy Act of 1969,* 24 Rutgers L. Rev. 230.

Section 103 does not provide an escape hatch for HUD. HUD is prohibited from going to 103 and complaining of conflict. To even admit or argue conflict, without having complied with 103 by going back to Congress, is to admit a violation of the law. As Judge Bohanon in the Trial Court said, "A serious dereliction of duty." Section 103 demands that HUD to go back to

Congress and obtain the necessary adjustments to their present statutory mandates—*if* they feel there are adjustments needed—to bring their present jurisdictional grants into full and complete compliance with NEPA. This HUD has not done; and, therefore, HUD must agree with the Courts' determination that HUD is governed by NEPA while conducting its activities as the agency in charge of administering the Interstate Land Sales Act, including Interstate Land Sales filings.

The legislative history leaves no doubt as to the purposes of Section 102:

> "Second. To insure that the policies and goals defined in this act are *infused into the ongoing programs and actions* of the Federal Government, the act also establishes some important 'action-forcing' procedures. Section 102 authorizes and directs all Federal agencies, to the fullest extent possible, to administer their existing laws, regulations, and policies in conformance with the policies set forth in this act. IT ALSO DIRECTS ALL AGENCIES TO ASSURE CONSIDERATION OF THE ENVIRONMENTAL IMPACT OF THEIR ACTIONS IN DECISION-MAKING. IT REQUIRES AGENCIES WHICH PROPOSE ACTIONS TO CONSULT WITH APPROPRIATE FEDERAL AND STATE AGENCIES HAVING JURISDICTION OR EXPERTISE IN ENVIRONMENTAL MATTERS AND TO INCLUDE ANY COMMENTS MADE BY THOSE AGENCIES WHICH OUTLINE THE ENVIRONMENTAL CONSIDERATIONS INVOLVED WITH

SUCH PROPOSALS." 115 Cong. Rec. 40415, 40416 (December 20, 1969). (emp. added)

While this Court may choose to adopt an unworkable definition of "major federal action" it cannot ignore the thorough reading of the Congressional intent made by virtually every lower court jurisdiction in the United States. As the Court said in *E.D.F. v. T.V.A.*, supra, "We believe it more consonant with Congressional intent to hold than an agency must file an impact statement whenever the agency intends to take steps which will result in a significant environmental impact"; or as the Court said in *Zabel v. Tabb* (C.A. 5, 1970) 430 F.2d 199, cert. den. 401 U.S. 910 (1971):

> "This act essentially states that every Federal agency shall consider ecological factors when dealing with activities which *may* have an impact on man's environment." Opinion at 211. See also Senate Report 91-296, p. 20.

The Courts are unanimous on this point.

C

Take A Hard Look Federal Action on the Environment

No evaluation of the term "major federal action significantly affecting the quality of the human environment" could be complete which does not constantly bear in mind that the action-forcing procedures of NEPA were

drafted in response to the Congressional belief that Federal agencies had given far too little attention to the environmental consequences of their actions. See *A Special Report to the Senate Committee on Interior and Insular Affairs,* 90th Cong. 2nd Sess. *A National Policy for the Environment* pp. 8 & 10-11.

This is why section 102(B) requires all Federal agencies to give full consideration to the environmental impact of their decision making. This requirement is also implicit in the substantive mandate of section 101 and in section 102(1), which requires interpretation of all laws, policies and regulations in accordance with the Act. It is obvious that a purely mechanical compliance with the particular measures required in section 102(C) and (D) will not satisfy the Act if they do not amount to a full, good faith consideration of the environment. The requirements of section 102(2) must not be read so narrowly as to erase the import of section 101 and section 102(1), and section 102(2)(A) and (B). *Calvert Cliffs Coordinating Committee v. A.E.C.*, (C.A.D.C., 1971) 449 F.2d 1109.

Furthermore, Executive Order 11514, 35 F.R. 4247 (1970), suggests that NEPA is to be applied to federal actions involving a federal lease, permit, license, certificate or other entitlement to use; and C.E.Q. Guidelines specifically provide for broad application to the full range of agency activities:

§ 1500.5 C.E.Q. GUIDELINES

Types of actions covered by the Act.

(a) "Actions" include but are not limited to:

(1) Recommendations or favorable reports relating to legislation including requests for appropriations. The requirement for following the section 102 (2)(C) procedure as elaborated in these guidelines applies to both (i) agency recommendations on their own proposals for legislation (see § 1500.12); and (ii) agency reports on legislation initiated elsewhere. In the latter case only the agency which has primary responsibility for the subject matter involved will prepare an environmental statement.

(2) New and continuing projects and program activities: directly undertaken by Federal agencies; or supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance (except where such assistance is solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et. seq. with no Federal agency control over the subsequent use of such funds; *or involving a Federal lease, permit, license certificate or other entitlement for use.*

(3) The making, modification, or establishment of regulations, rules, procedures, and policy.

See also, C.E.Q. Third Annual Report to Congress.

The Federal Courts have determined that the threshhold of federal involvement in private or state action to which NEPA applies should be pushed quite low, because all that is being asked is that the Federal Govern-

ment prepare an adequate environmental information base before it acts, no matter how slight its role. If this obligation seems burdensome to HUD or any other Federal agency, then, as one scholar has suggested, and this Court has indicated, the scope of the environmental impact statement could be shaped or narrowed to fit the limited federal impact on the environment, RATHER THAN HAVING NO STATEMENT AT ALL. See *Aberdeen Rockfish Railroad Co. v. S.C.R.A.P.* (1975) 422 U.S. 289 and Anderson, *NEPA, in Federal Environmental Law,* Dolguin & Gilbert, E.d., pp. 346-47. The cases are too numerous to list in which indirect or tenuous federal participation was not a bar to the preparation of an impact statement. See, for example, *Davis v. Morton,* (C.A. 10, 1972) 469 F.2d 593; and *Ely v. Velde,* (C.A. 4, 1971) 451 F.2d 1130; and *National Forest Preservation Group v. Butz,* (C.A. 9, 1973) 485 F.2d 408.

How broad is the reading the Courts have given and should give to the applicability of NEPA? Where there has been a question about the applicability of the Act to a particular action, the Courts have looked to a challenged project's long-range effects, or to its impacts when cumulated with those of allied activities, to find that potential direct and *indirect* environmental impacts in the larger context are significant. See C.E.Q. Guidelines, (1973) 40 C.F.R. § 1500.6(a). The more consequences

and alternatives the Court considers, the more significant the narrow "triggering" action which is under challenge becomes. *Ely v. Velde,* (C.A. 4, 1971) 451 F.2d 1130, 1137 n. 22.

And, where agency guidelines themselves call for the preparation of an environmental impact statement or clearance in one form or another, then, in effect, the agency concedes major federal action exists, and it cannot complain that its actions are too remote in consequence or trivial to require an environmental clearance. See *Silva v. Romney,* (D. Mass., 1972) 342 F. Supp. 783 and *National Helium Corporation v. Morton* (C.A. 10, 1971) 455 F.2d 650, and generally *Service v. Dulles,* (1957) 354 U.S. 363; *Vitarelli v. Seaton,* (1959) 359 U.S. 535.

This Court can yield to the urgings of economic expediency or governmental hostility and sloth and enunciate a rigid or absolutist definition of major federal action. To do so will violate Congressional intent and emasculate the purpose and policy of NEPA. The intent of Congress was (1) to enlarge the Federal agencies' basic mandate through enactment of a national environmental policy; (2) establish "action-forcing" procedures to attain that policy; and (3) foster the development of indices of environmental quality. This Court can also ignore the fact that no decided case applying a two-test standard has refused to require an environmental impact statement

when the environmental effects of a so-called minor project were significant, Anderson, ***NEPA in the Courts,*** p. 95. The lower federal courts have avoided what appears to be an unnecessary distinction by deciding that Congress intended NEPA to cover *all* pending federal actions that might cause significant environmental effects. "Congress' use of both 'major' and 'significantly affecting' appears to have been for emphasis, nothing more," Anderson, ***NEPA in the Courts,*** p. 89. See ***Minnesota Public Interest Research Group v. Butz*** (C.A. 8, 1974) 498 F.2d 1314.

As this Court wisely recognized in ***SCRAP II,*** the definition of major federal action, like that of Due Process of Law, must remain inherently flexible. There can be no absolute quantum of federal involvement to be used as a judicial measurement in the applicability of NEPA to agency decision-making. This would place the Act in a procrustean bed and allow it to be chopped to fit the bias of inimical agencies and private parties, rather than giving it the effect intended by Congress—application to *all* Federal agencies whenever they intend to take steps or permit others to take steps which will have significant impact on the environment.

We have, so far, avoided the catastrophe of deciding what "Due Process of Law" is by following the wiser course of determining what conduct on the part of State

or Federal officers does not accord that protection to the people. Attainment of the environmental policy under NEPA is an equally invaluable right, and it should not be destroyed by a formalistic definition of major federal action or significant effect on the quality of the human environment to satisfy short-term economic aims or unwillingness to accept administrative burdens. If the Court's aim is to decrease the amount of public interest litigation, it can do so by instructing the Federal agencies to obey Congress' mandate. In this regard, clarification would be a salutary thing, but to discourage vindication of the public interest by a constricted definition of the beleaguered terms, "major" and "significant," would do justice neither to the economic nor the environmental interests in this case, particularly, since the two interests, in the long run, are identical. Setting definitions in stone would repeal, and not *sub silentio,* a Congressional enactment by precipitate judicial decision. It will allow the Federal agencies to defederalize all projects to avoid compliance with NEPA and escape responsibility by claiming over and over: "But we haven't done anything."

No case supports the illogicality which would flow from construing "major federal action" without regard to the purposes of Congress in enacting NEPA which included forestalling repetition of the kinds of environ-

mental errors and disasters which had been brought to its attention.[10]

Petitioners understate the statutory authority of H.U.D. under the Interstate Land Sales Act. Among other things, H.U.D. can initiate criminal prosecutions and the Act also provides civil liabilities which may be enforced by H.U.D. and by the general public.

More importantly, however, it must be borne in mind throughout this whole discussion that H.U.D.'s action is a regulatory action which, if not taken, will mean that a particular filing or development will *never* be able to be sold in Interstate Commerce. In a project of the magnitude of the one under consideration, this would mean that the project would never be undertaken at the outset, or if undertaken, it would be terminated at an early stage. It is ridiculous to assume that environmental degradation will be carried out by a developer, or anyone, unless the developer may ultimately believe that he will be able to profit by his activities.

An issue before this Court is, of course, whether, under the facts of this case, there is major federal action which significantly affects the quality of the human environment. We submit that this test has been met through clear and convincing proof, which proof has been accepted

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[10] Anderson, *NEPA in the Courts*, p. 95.

in findings of fact made by the Trial Court and are now binding on this Court. *Wyoming Outdoor Coordinating Council v. Butz*, (C.A. 10, 1973) 484 F.2d 1244. Whether that phrase constitutes one or two tests is actually immaterial because: (1) The significant effect has been admitted by all parties to these appeals; and, (2) Evidence and findings of fact were submitted and accepted by the Court to establish both tests.

There is, therefore, major federal action in this case for the following reasons:

1. It makes no sense to find federal action minor when the effect of the action is substantial. Given the admission that the effect of the action is substantial there is, therefore, major federal action. *Minnesota Public Interest Research Group v. Butz* (C.A. 8, 1974) 498 F.2d 1314; *National Forest Preservation Group v. Butz* (C.A. 9, 1973) 485 F.2d 408; *Simmans v. Grant* (D.C.S.D. Tex., 1974) 370 F. Supp. 5; *Wyoming Outdoor Coordinating Council v. Butz,* supra.

2. The question of federal action is a mixed question of law and fact and, to the extent that facts have been found by the Trial Court to substantiate major federal action, those facts are binding on this Court. *Rucker v. Willis* (C.A. 4, 1973) 484 F.2d 158; *Wyoming Outdoor Coordinating Council v. Butz* (C.A. 10, 1973) 484 F.2d 1244.

3. As the concept of federal action has evolved, one test for federal action is whether, as a result of the federal action, a private party is then permitted to undertake environmental degradation, then such action is major. *Minnesota Public Interest Research Group v. Butz* (C.A. 8, 1974) 498 F.2d 1314; *National Forest Preservation Group v. Butz* (C.A. 9, 1973) 485 F.2d 408; *Simmans v. Grant* (D.C.S.D. Tex., 1974) 370 F. Supp. 5.

4. When an agency exercises jurisdiction based upon the plenary power of Congress to act under Constitutional authority, such action is per se major federal action. *Davis v. Morton* (C.A. 10, 1972) 469 F.2d 593.

The Trial Court made numerous findings of facts supporting the conclusion that there was major federal action, and that there was a substantial effect upon the quality of the human environment. These findings are, of course, binding upon this Court. *Wyoming Outdoor Coordinating Council v. Butz* (C.A. 10, 1973) 484 F.2d 1244. The question of whether an action is major federal action is one involving factual determinations. *Rucker v. Willis* (C.A. 4, 1973) 484 F.2d 158.

As found by the Trial Court, the development may destroy forever the environmental quality of the Illinois River Basin and it will have actual effect upon the depth and course of the river, its tributaries, drainage areas, etc. The Trial Court made findings both as to *actual* and

potential effects upon the quality of the human environment. The Trial Court also made findings with respect to the scope of the project and other activities associated with the quality of the human environment and the scope of the effect of the action taken by H.U.D. in this case.

The principal thrust of FLINT RIDGE's argument seems to be that there is no federal action because H.U.D. does not finance, plan, etc., development. They also suggest that H.U.D., being a regulatory agency in the contects of I.L.S.A., simply does nothing more than regulate, and therefore the concept of regulation of itself does not constitute major federal action. It is quite clear from the following cases that the determination of whether there is "major federal action" has evolved substantially from the rather simplistic approach taken by the Court in ***N.R.D.C.*** *v.* ***Grant*** (E.D.N.C., 1972) 341 F. Supp. 356. Even so, Judge Bohanon made findings which were totally consistent with the ***N.R.D.C.*** case.

At the outset, it must be recognized that all Courts accept the view that the federal agencies, under the "to the fullest extent possible" mandate of N.E.P.A., must strictly comply with the mandates of the Act. The leading case is the *Calvert Cliffs* decision. The Court in ***Wyoming Outdoor Coordinating Council*** *v.* ***Butz,*** supra, referred to the Act's mandatory requirements and high standards. As a result of these and other decisions, N.E.P.A. is

now recognized as an Act which imposes a duty on *every* federal agency to consider the effects of *each decision* upon the environment and to use *all* practicable means to avoid environmental degradation. In his book, ***N.E.P.A. in the Courts,*** Mr. Anderson states:

> "If low-level federal activities were exempted, one of Congress' main purposes in enacting the statute would fail to be achieved. Yet NEPA's legislative history shows that Congress intended to interrupt business-as-usual and affect decision making at the lowest agency levels." (P. 74, emp. added).

The Act provides ways and means to identify the effects and imposes procedural duties, duties which are *not* inherently flexible to insure compliance with the Act.

Government agencies have sought to avoid the effect of N.E.P.A. on the grounds that their acts are nondiscretionary. This argument was thoroughly rejected in the case of ***Ely*** *v.* ***Velde*** (C.A. 4, 1971) 451 F.2d 1130. In that case the Plaintiffs charged that the L.E.A.A., the federal agency responsible for administering the Safe Streets Act grants, had failed to take into account the effect of a prison center on the environment and had failed to comply with N.E.P.A. The defendants contended that, because of the peculiar nature of the block grants administered by L.E.A.A., the statutory requirements of N.E.P.A. did not apply. The Circuit held N.E.P.A. to apply.

The problem involved was that under the Safe Streets Act, Title 42 U.S.C. § 3733, the L.E.A.A. was *required in nondiscretionary terms to make grants.* The Fourth Circuit rejected this argument and stated, "The L.E.A.A. misconstrues the language 'to the fullest extent possible' found in N.E.P.A. The quoted language does *not* render the procedural requirements of N.E.P.A. discretionary. Rather the words are an injunction to all federal agencies to exert utmost efforts to apply N.E.P.A. to their own operations. In short, the phrase 'to the fullest extent possible' reinforces rather than dilutes the strength of the prescribed obligations." The Court also rejected the assumption that the Safe Streets Act is irreconcilable with N.E.P.A. This Court employed the same reasoning in rejecting a similar assumption in *Davis v. Morton.*

Federal agencies have also sought to avoid compliance with N.E.P.A. on the theory that it is not the federal agency which is affecting the environment, but it is a private enterprise which will ultimately engage in the harmful environmental activities. This is, of course, exactly what FLINT RIDGE is doing and, therefore, H.U.D. has no authority or reason for not doing an environmental impact statement.

This rationale has also been rejected time and again by the Courts.

In *Scientists' Institute for Public Information v.*

A.E.C. (C.A.D.C., 1973) 481 F.2d 1079. The A.E.C. had begun a technology research program and at issue was whether N.E.P.A. applied to such program. On p. 1088 of the Opinion, the Court stated and held that there was major federal action within the meaning of the statute not only when the agency proposes to build a facility itself, but whenever an agency makes a decision *which permits action by other parties which will affect the quality of the human environment.* In that case the development of technology would have allowed utilities to build nuclear power facilities.

The case of *Simmans v. Grant* (D.C. Tex., 1974) 370 F. Supp. 5 clearly supports the position taken by the Appellees in this case. In *Simmans* the Court discussed the issue of the test of major federal action. In so doing the Court noted that the issues as to whether a project is major or involves significant impact are not necessarily unrelated. In other words, the mere size of a federal involvement does not necessarily exempt the federal involvement from N.E.P.A. if its environmental effects are significant. The Court then held that:

> "To a great extent the determination of whether a project is major, relies upon the inquiry in whether the federal action, *whatever it may be, is the precipitating cause of the resultant environmental impact regardless of who or what may actually have caused the impact. If but for* the federal action, the impact

would not have resulted, then the federal action might be found to be major." (Emp. added).

John Steinbeck once described a Pacific tide pool as a metaphor of all life. The statement implies the knowledge of the complexity and delicacy of the interrelationships of all living organisms. Science does not claim it has sufficient ecological data to determine what makes a community cooperate and survive whether it is a tide pool or a larger multi-specific ecosystem like the Illinois River Basin. Science acknowledges the need for information from careful study to govern our actions toward our environment. Contrast this attitude with the supreme arrogance of the Government and the developer whose actions imply that we already know enough or that there is no need to know. The amount of Federal action is not controlling. The key is what that action sets in motion. As a matter of fact and of law, we know it is the kind of action and where it takes place that is determinative. We still need the kind of information compliance with NEPA will, or could, bring. This knowledge helps us understand how man-made changes affect an ecosystem and how that effect differs from a natural change. Our final decision may still be unwise, but at least we have a chance to apply what we learn. It may be that 3,000 septic tanks, storm water run-off, silt, change in fish and wildlife habitat, and severe economic burdens on poor rural counties will not adversely affect

the river basin because of development, but we cannot ignore the fact that the Courts have found there are actual and potential adverse effects from them *triggered by sales in interstate commerce.* Thoughtless arguments over the semantic distinction between "major" and "minor" actions and reliance on an excessively narrow construction of the statutory operating authority of ILSA to avoid compliance with the law can help no one. The Federal bureacracy will not perish from the Earth because it has to think about the environmental consequences of permission to sell lots in interstate commerce.

Major federal action is a mixed question of fact and law, and the courts below have made binding determinations on this issue, and that cannot be avoided by pretending it did not happen. These facts cannot be tried again at this level.

D

The Myth of Nondiscretion

The government and the developer, in tandem, repeat that HUD has no discretion in connection with the approval of interstate land sales filings, but is limited to a formalistic check of the statement of record to see that it meets technical requirements. This is the old tunnel vision ploy. It is nothing more than a spurious talisman designed to wish away the mandatory requirements of NEPA. It is argument by adjective, not fact. Can the

developer and its governmental handmaiden deny that the Secretary of HUD can require additional documentation and certification in the statement of record under 15 USC § 1705(12) for the protection of purchasers? Is this discretion? And if the Secretary, to protect purchasers and the public interest, suspends the statement of record and requires an amendment, is there still no discretion? See § 1706(b). What if, subsequent to the effective date of the statement, a change occurs affecting any material fact contained in the statement (such as controversy about the proposed development), and an amendment is ordered for the protection of the public interest, is there still no discretion? See § 1706(c).

Under 15 USC § 1706(d) the Secretary can determine that a material fact has been omitted which is necessary to make the statement not misleading under the circumstances order suspension and determine whether an amendment is necessary. If she so decides, she has absolute discretion to determine whether the amendment complies with *her* order.

She can also require certain information in the property report (the document circulated to prospective purchasers), because she feels it necessary to protect the purchaser and the public interest, and she may make rules and regulations to so order. Is there still no discretion?

Why the nondiscretionary Secretary even has a code of Federal Regulations to guide her actions in correcting statements of record, determining their adequacy, and requiring amendments and necessary changes. 24 C.F.R. § 1700.80.

24 C.F.R. § 1710.45(b) even gives her the "discretion" to suspend after the effective date of the statement of record, if it omits a material fact *she thinks* is necessary to make the statement not misleading, AND NOT JUST FOR THE OMISSION OF A FACT REQUIRED BY THE BASIC REGULATIONS. No discretion, indeed? And 24 C.F.R. § 1710.105 gives her the discretion to require additional information in the statement of record which she feels is necessary to protect the purchaser and the public interest.

Discretion lies heavy on the administrator of ILSA. It is an Act perfectly compatible with NEPA, and the exercise of discretion under ILSA in making decisions is a federal action. In this instance it is an action which *causes or induces*[11] actual and potential adverse effects on the human environment. The operating authority of ILSA and its implementing regulations bar the gate of

[11] HUD's own guidelines, Handbook 1390.1, 39 F.R. 38922 defines an environmental impact as 'any alteration of environmental conditions or creation of new environmental conditions, adverse or beneficial, caused or induced by the action or set of actions under consideration." Handbook 1390.1, Ch. 1,2(d).

nondiscretion to the HUD-developer group. Their argument is another superficial attempt to escape responsibility by a statutory construction of the narrow stripe rejected by Congress in the mandate set forth in the National Environmental Policy Act. 2 U.S. Code Cong. & Adm. News 1969, p. 2770.

Truth requires acceptance of the fact that there is no lack of procedure whereby the requirements of NEPA can be efficiently integrated with the requirements of ILSA. Robert M. Chasnow, *Compliance With NEPA in Interstate Land Sales,* Urban Land Journal, p. 12-13, May, 1975.

E

An Indispensable Burden

There is no crushing administrative burden as a result of this case or any other. Nevertheless, the National Environmental Policy Act has for its goals higher values than administrative ease.[12]

[12]HUD's claim that preparation of an impact statement in this *particular* case will result in a "crushing" administrative burden amounts only to a bad cliche and intolerable duplicity. While it pretends to comply with NEPA, its real attitude toward environmental policy has been a combination of hostility and indifference. Even as staid an institution as the General Accounting Office has been severely critical. In a *Report to Congress on the Department of Housing and Urban Development, "Environmental Assessment Efforts for Proposed Projects Have Been Ineffective"*, Comptroller General of the United States, No. B-170186 (July 22, 1975) the G.A.O. concludes:

HUD argues that because of the volume of filings HUD "could" (a significant "could") be required to prepare environmental impact statements upon a number of developments. This issue was not raised in the Trial Court and was not urged on appeal. In any event the concern of HUD with respect to the administrative problems has been rejected time and time again by all

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Note 12—*Continued*

> "In the 5 years since NEPA's enactment, HUD has not developed and implemented an adequate program for assessing the environmental impacts of projects proposed for its approval." (Rep. p. 37)
>
> The report also outlines the reasons for this conclusion. HUD's lack of priority and emphasis on environmental matters can be attributed primarily to empire building. HUD fears it will lose the opportunity to sponsor projects if the approval of applicant's plans is delayed because of time required to prepare environmental clearances, and if delayed, the developers would submit their proposals to other federal agencies or commercial lending institutions. HUD feels the environmental clearance function was added to their normal duties without a clear indication of its priority. Their own guidelines belie this claim.
>
> HUD's hostility to environmental policy is reflected in their response to the GAO's criticism of a very shoddy performance in implementing NEPA. HUD's excuse for *violating* the law is that they consider an EIS in association with a project proposal that ultimately will be rejected to be a waste of manpower and they prefer to disapprove the environmentally unsound projects before they reach an EIS stage or to have modified them along environmentally acceptable lines to carry out the spirit of NEPA without an EIS review. (Rep. p. 52) HOW CAN THIS OCCUR IN THE ABSENCE OF THE INTERDISCIPLINARY APPROACH AND ENVIRONMENTAL FINDINGS REQUIRED BY NEPA? As a

Federal Courts. *Calvert Cliffs Coordinating Committee v. A.E.C.* (C.A.D.C., 1971) 449 F.2d 1109 and its progeny have laid this argument to rest. These cases demand compliance with NEPA except where prohibited by specific statutes or impossibility. Neither situation obtains here. In all events, it must be recognized that in some cases the filing may have predated NEPA; in some cases the project may have been abandoned; and perhaps in some cases (after initial environmental review) it would be determined that there is no substantial effect on the quality of the human environment.

Note 12—*Continued*

form of environmental sop, HUD states that their field personnel still have to perform "timely, searching 'normal and special' environmental clearances on *all* projects." (Rep. p. 52) Yet they do little or none of these. (Rep. pp. 9 & 10)

HUD's claim of administrative burden is contradicted by the facts contained in the GAO report.

> "HUD offices nationwide processed from enactment of NEPA on January 1, 1970, through June 30, 1974, an estimated 30,000 project proposals which required environmental clearances. HUD offices determined that, of this number, only 81 were major federal actions which warranted environmental impact statements. (Rep. p. 11)

HUD's response to this indictment negates any right to argue that an administrative burden has been created by the lower courts' decisions. On page 58 of the report, HUD informs Congress that many project proposals relate to small projects and projects which clearly do not merit being labeled "major" or "significant" in the context of NEPA. THIS IS EXACTLY WHAT RESPONDENTS HAVE ARGUED THROUGHOUT THIS CASE. NOW HUD ADMITS THE BURDEN IS REALLY A HOLE IN THE AIR.

Secondly, NEPA requires innovative procedures. The legislative history of NEPA instructs us that "no agency shall utilize an excessively narrow construction of its existing statutory authorization to avoid compliance." The history further indicates that the phrase "to the fullest extent possible" is not to be used by *any* Federal agency as a means of avoiding compliance with the directives set out in NEPA. 2 *U.S. Code Cong. & Adm. News* 1969, p. 2770.

The argument of administrative burden further runs counter to the specific provisions of NEPA itself. For example, section 102(B) of NEPA requires Federal agencies to readjust their procedures, policies and thinking so as to comply with NEPA. As stated by the Council on Environmental Quality, the Act is a mandate to be innovative. See, C.E.Q. Third Annual Report to Congress.

Section 101(b) of NEPA orders the Government to use all practicable means to "improve and coordinate Federal plans, functions, programs and resources" to comply with NEPA's principles and policies.

Petitioners suggest that much occurred prior to the filing under the Interstate Land Sales Act. *This simply is not true.* It should be noted that only a minor portion of the activities were underway prior to the filing. In fact the Petitioner owned 7,000 acres and only a portion thereof was being developed under a phase development pro-

cedure. Secondly, the developer had another 14,000 acres under option which apparently has been dropped. Finally, much of the roads, the water supply and all of the construction activities and other forms of problems that would occur in the future were yet to be realized and would not be realized until such time as the sales had occurred and other people had become involved. (See Transcript, R. 489, 503, 504, 518.)

The issue in this case is *not how you do an impact statement* but rather is HUD required to comply with the law. Neither of the Courts below has told HUD how to perform its duty but each has unequivocally told it to perform.

Nor is the *adequacy* of performance at issue. Adequacy could not be an issue until HUD performs its duty—and if it performs in good faith, the Courts are most unlikely to interfere or substitute their judgment.

Finally, what HUD does with the evaluation is not a determinative factor as to whether compliance is required. As a minimum, however, we may suggest that the information will advise HUD officials whether adequate disclosure has been made; and, whether changes are needed in ILSA procedures. On the local and state levels, the information will be of use and value to those charged with repairing the environmental harms resulting

from the development. See Transcript R. p. 208 (pollution control), R. p. 281 (statewide planning), and R. p. 246 (recreation; and the Amicus Brief of New Mexico.

Petitioners' arguments further evidence a total disregard for the positive accomplishments of NEPA over the last six years. These have been summarized by Frederick R. Anderson in *"Six Years Under NEPA"*. Environmental Law Institute, 1976, p. 124-139.

First, NEPA has improved decision making. The Corps of Engineers claims that it has abandoned, or substantially modified, one of every three projects. HUD claims that many construction loans have been denied because NEPA analysis revealed that the *private developer's plans* were environmentally unsound.

NEPA has heightened public awareness of environmental issues and has lead to the quantifications of hitherto unquantified environmental values.

NEPA represents administrative reform. It has broadened the type and perspective of agency personnel; prompted interagency cooperation; and, improved the procedures by which an agency makes decisions.

Much of the so-called administrative burden has been removed. The trial of this case represents a broad and detailed environmental analysis. Then there is the C.E.Q.-H.U.D. study (Appendix D) which had for one

of its specific products an impact evaluation handbook. C.E.Q. Fifth Annual Report to Congress, p. 21, 26; 489, 490.

The argument is not dissimilar to that proposed in situations in which environmental protection agencies are involved. Mr. Anderson, in his book *NEPA in the Courts,* on p. 119, discusses answers to the "helpless" theories of the Government. He notes that even if the administrator must act quickly, or even if he has no discretion, impact statements can still serve the useful purpose of informing the public, the Executive Branch and the Congress of environmental impacts so that future remedies may be fashioned and discussed. Without NEPA the agency might well be reluctant to spell out the unavoidable risks and negative consequences of a proposed action. Finally the discussion of alternatives, which the administrator may in fact be helpless to implement, allows him to stimulate informed debate on future legislative needs. Although HUD has been required to formulate rules, it has not done so and is currently operating under what it terms HUD Handbook 1390.1 as the method for implementation of NEPA. It does have proposed rules which may be found at 39 F.R. 6816. Pertinent portions of the Handbook are reproduced herein. (Appendix "A")

The Courts require federal agencies to follow their

own guidelines and manuals in the implementation of their mandate under NEPA. *National Helium Corporation v. Morton* (C.A. 10, 1971) 455 F.2d 650; *Silva v. Romney* (D. Mass. 1972) 342 F. Supp. 783; *Scherr v. Volpe* (D.C. Wis., 1971) 336 F. Supp. 882 affirmed 466 F.2d 1027. It is quite significant to note that in Chapter 2, § 5(a)(1) of the Handbook certain exemptions from the general HUD policy for environmental clearances are set forth. The Interstate Land Sales Office is *NOT* exempted. A section provides "EXCEPT FOR THESE EXEMPTIONS ALL HUD ACTIONS MUST UNDERGO ONE OR MORE ENVIRONMENTAL CLEARANCES." To the same effect see Proposed Rules § 50(a)(3). Both the rules as proposed and the Handbook speak of an environmental impact in terms of "any alteration of environmental conditions, adverse or beneficial, *caused* or *induced* by the action, or set of actions, under consideration". 24 C.F.R. Part 50, § 50.3, 39 F.R. 6816 and Appendix D thereof; HUD Handbook 1390.1, Chapter 1, Section 2(d). The Handbook and the rules both suggest that major controversy concerning the existing or potential environmental effects is a factor used by HUD to extend its evaluation of environmental consequences. In the case before this Court we have more than a controversy—we have unappealed from judicial determinations of actual and potential affects upon the environment—all adverse.

To the argument that they will have to do environmental impact statements on each and every development, we can only point out that HUD provides threshholds below the magnitude of the Flint Ridge project. Some projects may require full environmental clearances and others lesser reviews. In all events, the nature and extent of the other numerous filings is not at issue before this Court nor was it in issue before the lower courts hearing this case.

Again, both the Handbook and the proposed rules provide for the conditioning of authorization upon compliance with environmental safeguards. Handbook 1390.1, Chapter 1, § 3(b); Proposed Rules 50.11(h)(2), 39 F.R. 6819. HUD may reject the matter if the environmental impacts are unacceptable, even after modification. Handbook 1390.1, Chapter 2, § 5(b)(1); Proposed Rules § 50.14(5)(d), 39 F.R. 6822.

The Handbook, in Chapter 1, §§ 3(a) and 3(b), instructs HUD officials to work with the applicant to suggest changes, to receive proposals, etc., all designed to prevent or minimize adverse environmental consequences. The same instructions are contained in Chapter 2 § 5(a)(7) of the Handbook and in the Proposed Rules § 50.11(h), 39 F.R. 6819.

It should be pointed out that the Handbook sets up a mechanism in Chapter 2, Section 5(a)(7) whereby the

applicant submits the basic yet detailed environmental information. The format for this submission is contained in the Appendix C-1 to the Handbook. In the Proposed Rules it is called ECO Form 1 (See p. 412 of the Transcript where Mr. Weaver, an official of HUD, testified that he did not know whether HUD could compel a developer to submit an environmental impact statement).

Nor may administrative inconvenience rest upon the premise of a 30-day "effective" date. Over 90 percent of the statements are not effective within the 30-day period because of suspension notices. Robert Chasnow, "COMPLIANCE WITH NEPA IN INTERSTATE LAND SALES" *Urban Land Journal* May, 1975, pp. 12 & 13. Simply incorporating existing regulations which provide environmental evaluation procedures, would involve a situation, therefore, in which the statement of record would be incomplete without the full explanation of the environmental consequences and a suspension notice would stop the 30-day period.

The developer could prefile with the Interstate Land Sales Office a notice of intent to file the statement of record. This notice of intent, a procedure used by many other agencies, would initiate the environmental review process and provide ample time to review the environmental consequences. On p. 14, footnote 11 of Flint Ridge's Petition, the suggestion was made by Petitioner

that HUD could not comply in this manner. The premise seems to be that the agency could not begin to examine the environmental consequences until the sales began. This is utter nonsense and would be the same as saying that the Corps of Engineers could not examine the environmental merits or demerits of a proposed dam until the dam was built. Furthermore, HUD's own regulation, under the Interstate Land Sales Act, § 1710.105, provides for broad and extensive disclosures and information as may be necessary for protection of purchasers or the public interest.[13]

Of course, there is another reason for preparing the environmental review, which is in no small way important, and this is that the environmental degradation imposed by the development then becomes a matter of public information and disclosure. See *N.R.D.C. v. S.E.C.* (D.C.D.C., 1974) 389 F. Supp. 689 and discussion therein of "ethical investors."

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[13] "24 C.F.R. Sec. 1710.45(b)(i). As to the 'not misleading' requirement, see Instruction A(2) of the Instructions for Completion of the Statement of Record. *24 C.F.R. Sec. 1710.105*, which requires that

> 'in addition to the information expressly required to be stated in the statement of record, there shall be added such further material information, documentation and certification, *if any, as may be necessary in the public interest and for the protection of purchasers or necessary in order to make the statements in the light of the circumstances under which they are made, not misleading.*'" (Emphasis added) See also proposed Rule 50.11(i), Appendix B, p. 22a, *infra*.

The Petitioner makes the querulous complaint that the decision has implications for other Federal agencies. For example, they refer to the problems that may be encountered by the Securities and Exchange Commission. The Securities and Exchange Commission had its problems and lost the case of *N.R.D.C. v. S.E.C.* (D.C.D.C. 1974) 389 F. Supp. 689.

There is no evidence to support any consideration that there will be wide impact from the decision or that the industry involved will be unable, together with HUD, to comply with the National Environmental Policy Act.

Notwithstanding the fact that such argument is raised now for the first time before this Court, and further that there is no evidence to support the statement, it is distinctly possible that under the existing HUD guidelines there will, in fact, be no wide impact. To begin, many projects on file with HUD may have been filed prior to the enactment of NEPA or because of their age may be completely developed and sold.

Secondly, other projects may have been abandoned, may be under some form of suspension for economic or other reasons entirely independent of NEPA. In the former instance, it would probably not be necessary to proceed with environmental clearances until such time as it appears that the project will be reinstated. In that latter instance again the agency and the developer is on notice of the existence of the National Environmental

Policy Act and could well use the suspension time to bring itself into compliance.

With respect to the remainder of the cases, HUD in its guidelines has a three-tier approach to environmental review. In some instances it may be possible to undertake the environmental review, in good faith, and as a result thereof determine that there would be no significant effect upon the quality of the human environment. Granted, in some instances it may be necessary to carry the environmental review process to its ultimate conclusion, and that is a full-fledged environmental impact statement. However in those instances where that is necessary, it is in the public interest and in furtherance of the National policy that it be done.[14] Such environmental review would be compatible both with the Interstate Land Sales Act so as to protect purchasers and the public and the National Environmental Policy Act. However, neither Petitioner nor Respondent can advise this

[14] Compliance with NEPA invariably results in delay and concomitant cost increases, and Congress has implicitly decided that these costs must be discounted. *Steubing v. Brinegar* (C.A. 2, 1975) 511 F.2d 489 at 497. See also *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 422-23 (2d Cir.), cert. denied, 409 U.S. 849, 93 S.Ct. 56, 34 L.Ed.2d 90 (1972); *Calvert Cliffs' Coordinating Comm. v. AEC*, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1122 (1971). Another direct result of NEPA-caused delays that Congress undoubtedly was aware of, is that the jobs created by a construction project might be interrupted and that the initial employment of some persons might be postponed.

Court as to how many projects would require full environmental impact statements.

Petitioner closes with a plea to this Court to reverse the case because of so-called (yet unproven) effects upon the economy. Petitioner apparently feels that the land and our natural resources are not capital and thus free for the taking. Nothing could be further from the truth. Our economy can not risk the burden of failure to comply with environmental considerations.

F

The Fullest Extent Possible

Since compliance with N.E.P.A. by HUD, as the administering agency under ILSA, is not prohibited by statute nor impossible, then the decisions of the courts below are correct in all respects.

Petitioners argue that by requiring an environmental impact statement of HUD for a project on the Illinois River, the decisions of the lower courts frustrate the scheme of ILSA and conflict with existing case law. As the Tenth Circuit stated in its opinion, "we regard this as superficial." Petitioners rely on a nonexistent holding in *S.C.R.A.P. v. U.S.* (1973) 412 U.S. 669 to support their claim that by ordering HUD to comply with NEPA the Courts have in effect repealed or amended ILSA. This is nonsense.

The issue in *S.C.R.A.P.* I was not whether there was general judicial power in a Federal District Court to determine if a Federal agency has complied with NEPA and to grant equitable relief if it has not, but rather whether, "in a specific context NEPA sub silentio *revived judicial powers* that have been explicitly eliminated by Congress" 412 U.S. 669, 696 (emphasis added).

S.C.R.A.P. I dealt with a unique situation concerning a specific statute which restricted the power of the Federal Courts to grant injunctions, and not the general applicability of NEPA to actions by Federal agencies which have impact on the environment or permit private parties to take action which will have an impact. In the context of the case Petitioners ask this Court to review, *S.C.R.A.P.* I is totally irrelevant.

The second *S.C.R.A.P.* case is *Aberdeen and Rockfish Railroad Co. v. S.C.R.A.P.* (1975) 422 U.S. 289, 45 L.Ed.2d 191. Implicit in this Court's review of the sufficiency of the ICC's compliance with NEPA is this Court's recognition of the applicability of NEPA to even the ICC.

This Court also stated that the unique procedure of a general revenue proceeding under ICC was major federal action thereby requiring compliance with NEPA so long as the proceeding had a substantial effect upon the environment. This instructs us that the matter of Federal action and effect upon the environment are intertwined

and that there are not really two tests but a mixed test. *Rucker v. Willis* (C.A. 4, 1973) 484 F.2d 158 and *Wyoming Outdoor Coordinating Council v. Butz* (C.A. 10, 1973) 484 F.2d 1244.

Under the facts of this case, again facts which are unappealed from, there is clear actual and potential substantial effect on the environment. As this Court stated, "NEPA does create a discreet (*sic*) procedural obligation on government agencies to give written consideration of environmental issues in connection with certain major federal action and a right of action in an adversely affected party to force that obligation." 45 L.Ed.2d at 215.

The argument with respect to operational conflict, between ILSA and NEPA, becomes even more absurd after even a brief review of the legislative history of NEPA. After extensive debate about the meaning of NEPA's language in Section 102, "to the fullest extent possible," a statement was issued by the Bill's managers in the House which declared that the Act was to be complied with fully unless existing statutory law expressly prohibited full compliance or made it impossible. 115 Cong. Rec. 39703 (Dec. 17, 1969).

The case of *Calvert Cliffs Coordinating Committee v. A.E.C.* (C.A.D.C., 1971) 449 F.2d 1109 has made clear that Congress intended to excuse an agency from com-

pliance *only* where conflicting authority expressly prohibited compliance with NEPA or made it impossible. 449 F.2d 1115, Note 12.

In the Joint Senate Oversight Hearings the correct interpretation of NEPA emerged, i.e. under NEPA the decision-maker must take a hard look at the environmental consequences of the decision and then decide. This Court said the same thing in the *S.C.R.A.P.* II case. Only where an agency would have to disobey a *specific* statutory command in order to apply NEPA would the latter statute give way. In practically every conceivable set of circumstances, including the one here, such a situation does not occur. *Joint Senate Oversight Hearings,* 92nd Cong. 2nd Session, Ser. No. 92-H-32 (1972) pp. 455-6.

The argument of Petitioner that enforcement of NEPA frustrates the statutory scheme of ILSA completely ignores the obvious legislative intent that Federal agencies *must* reconcile conflicts and fashion compromises. The legislative intent, which has been unanimously accepted by all of the Federal Courts, is not to choose *either* to carry out a development mandate *or* to protect the environment. This instance is merely a lame attempt by HUD to escape the duties of NEPA and its own regulations.

The fallacy of the either/or argument was destroyed

with finality in *Calvert Cliffs Coordinating Committee v. A.E.C.*, supra.

A recent lucid example is *N.R.D.C. v. S.E.C.* (D.C.D.C., 1974) 389 F. Supp. 689.

> "Superimposed upon this grant to the SEC of broad rulemaking authority is the Congressional mandate to the federal agencies which is contained in NEPA; that is, NEPA gives specific content to the SEC's authority under the securities laws to require disclosure of information 'in the public interest'. As analyzed in *Calvert Cliffs' Coordinating Comm. v. AEC,* 449 F.2d 1109 [2 ERC 1779] (D.C. Cir. 1971), the procedural requirements of NEPA § 102, 42 U.S.C. § 4332, must be carried out 'to the fullest extent possible'. These procedural requirements are, inter alia: (1) that "policies, regulations, and public laws of the United States shall be interpreted and administered' in accordance with NEPA policies; and (2) that 'all agencies of the Federal Government shall—. . . . (F) Make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment.' Thus, Congress has directed the SEC and this Court to interpret the securities laws *to the fullest extent possible* in accordance with the overriding Congressional mandate of NEPA to protect and enhance the Nation's environment. Specifically, *Congress* has determined that the dissemination of information to governmental units, institutions, and interested individuals, can aid the purposes of NEPA." (Emp. added)

Petitioners admit that ILSA is patterned after the Securities and Exchange Act of 1933, 15 U.S.C. § 77a et seq.

Under § 1706(a) of ILSA the Statement of Record becomes effective 30 days after filing but the Secretary is required to give due regard to protection of purchasers *and* the public interest in determining the actual effective date.

Under § 77h of the Securities and Exchange Act, the effective date is 20 days after filing. Notwithstanding the so-called "automatic" effective dates, the Court in *N.R.D.C. v. S.E.C.* (D.C.D.C., 1974) 389 F. Supp. 689, stated in effect that the S.E.C. had to comply with NEPA.

That S.E.C. has accepted this ruling is disclosed by the fact that the S.E.C. has failed to appeal therefrom and is now or has conducted public hearings to bring its procedures into compliance with NEPA.

In spite of HUD's statement that disclosure filings under ILSA are not Federal actions for the purposes of NEPA Flint Ridge *admits* that NEPA applies to interstate land sales on p. 17 of its Petition to this Court as does the government on page 17, note 16 of its brief.

HUD's refrain throughout this protracted evasion of its duties under NEPA is that it made no recommendation or report on proposals for legislation, but it does

NOT DENY THAT it *took action* (permitting an interstate land sales filing to become effective) and cannot now challenge a finding of fact that this led to a substantial adverse effect on the quality of the human environment. Nor can HUD ignore that Section 102(2)(C) of NEPA includes such action, and in fact HUD admits that its own regulations, 24 C.F.R. 1710.105 and 1710.110, require some disclosure of environmental information. The incredible and destructive irony of HUD's attitude is reflected by its letter of March 7, 1974 to Respondents, in which the administrator of the OILSR said:

> "In July, 1973, Secretary Lynn promulgated policy contained in 1390.1, A Handbook of Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality. Disclosure filings required by the Interstate Land Sales Full Disclosure Act are not considered federal actions for purposes of compliance with the National Environmental Policy Act and implementing regulations."

The cold, undisguised truth is that HUD's own handbook gives the lie to its claims. *HUD has already made a determination that NEPA applies to interstate land sales filings.* (Handbook 1390.1, 38 FR 19182, July 18, 1973, 39 FR 38922 Nov. 4, 1974).[15]

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[15] This Handbook was promulgated in response to NEPA's directive that the Federal Government use all practicable means to implement national environmental policy. One of the main tools for compliance is the EIS. The Handbook sets forth HUD policy

Further rule making is really not required. HUD has rules and procedures to establish the environmental effects of its decision to declare that Flint Ridge or any other developer has complied with the Interstate Land Sales Act. Petitioner has attacked the decision below on the ground that it converts "any Federal action" into major Federal action. To begin this is similar to a syllogism with one premise missing because the argument fails to take into consideration the *unappealed* from Findings of Fact that there is major federal action AND SUBSTANTIAL EFFECT ON THE QUALITY OF THE HUMAN ENVIRONMENT. See *Aberdeen and Rockfish Railroad Co. v. S.C.R.A.P.*, supra, at 45 L.Ed.2d 215.

Second, Petitioner, Flint Ridge, details a number of statutes involving authority to an agency to control or

Note 15—*Continued*

and delineates the procedure which all HUD agencies will follow in arriving at the determination as to if and when an EIS is to be prepared. Chapter 2, Part 5(a)(1), of the Handbook lists all HUD activities which are exempt from the requirements of the Handbook. There are three complete exemptions ("an individual action on a one-to-four family dwelling, training grants, individual rehabilitation grants"), and two partial exemptions which concern emergency disaster relief programs. Following the enumerated exemptions is the statement, "*Except for these exemptions, all HUD actions must undergo one or more environmental clearances.*" OILSR activities, therefore, would be included in the category which is subject to the HUD procedure of environmental clearance. That procedure consists of a three-tier review of all actions including individual project actions, legislation, regulations, and all policy documents.

regulate some form of private activity. These statutory provisions are no different than the control of interstate land sales given to HUD by ILSA. See, for example 15 U.S.C. § 1705(12), § 1706(a)(d), § 1707(a), and 24 C.F.R. § 1710.105. In fact, it is even a crime to sell without HUD approval under the Interstate Land Sales Act.

The relevant regulation, 24 C.F.R. 1700.80(a)(b)(c) is set forth in the Appendix D. These statutes and regulations establish beyond challenge that ILSA gives HUD federal control over, direct involvement in, and power to approve action of private parties which can and does adversely affect the environment. The Circuit Court opinion did in fact deal with organic statutes no different from the organic statute involved here.

Even assuming, although we do not agree, that there is a two-test standard under NEPA, no decided case (including *Aberdeen and Rockfish Railroad Co. v. S.C.R.A.P.* at p. 215 of 45 L.Ed.2d) has refused to require an EIS when the effects of the so-called minor activity were significant. See e.g., *Minnesota Public Interest Research Group v. Butz* (C.A. 8, 1974) 498 F.2d 1314 and *National Forest Preservation Group v. Butz* (C.A. 9, 1973) 485 F.2d 408.

To even assert operational conflict at this late date is to admit violation of the law. Section 103 of NEPA mandated review of existing agency programs and au-

thorities. HUD is subject to the same criticism with regard to this section of the Act as was the A.E.C.

> "The Commission, however, cannot justify its time lag under these Section 103 provisions. Indeed, it has not attempted to do so; only intervenors have raised the argument. Section 103 could support a substantial delay only by an agency which in fact discovered an insuperable barrier to compliance with the Act and required time to formulate and propose the needed reformative measures. The actual review of existing statutory authority and regulations cannot be a particularly lengthy process for experienced counsel of a federal agency. Of course, the Atomic Energy Commission discovered no obstacle to NEPA implementation. Although it did not report its conclusion to the President until October 2, 1970, that nine-month delay (January to October) cannot justify so along a period of noncompliance with the Act. It certainly cannot justify a further delay of compliance until March 4, 1971. *Calvert Cliffs Coordinating Committee v. A.E.C.,* supra, p. 1120.

V
CONCLUSION

There is no question that NEPA applies to federal permission to private parties. In this case, the permission takes the form of a letter of compliance which is issued as a result of a *decision* that all things necessary to be done have been.

The issue is: *Based on the facts of this case* whether

OILSR must prepare an environmental impact statement before granting permission to sell in interstate commerce for this particular development. THERE IS NO DOUBT THAT IN THE ABSENCE OF THAT PERMISSION THIS PROJECT, WHICH HAS DEMONSTRABLE POTENTIAL AND ACTUAL ENVIRONMENTAL EFFECTS, would never have begun and would never be completed. In issuing a letter of compliance the Government has taken steps which have a significant impact on the environment. It is required to prepare an environmental impact statement.

There are no excuses for noncompliance in this case and it would violate the law to have them. Congress meant what it said in NEPA. And it is time for HUD to stop violating the law and get on with the business of the interdisciplinary approach to protecting the environment.

We ask you to affirm.

Respectfully submitted,

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APPENDIX A

Department of Housing and Urban Development Procedures for Protection and Enhancement of Environmental Quality

Dept. Handbook 1390.1, 38 FR 19182 (July 18, 1973), amend. 39 FR 38922 (Nov. 4, 1974)

On October 20, 1972 (37 FR 22673) the Council on Environmental Quality published HUD Circular 1390.1, "Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality" implementing section 102(2)(C) of the National Environmental Policy Act of 1969 (P.L. 91-190). Although this Circular was issued as a draft on July 16, 1971, it was made effective immediately, pending issuance of final procedures.

The Department consulted with the Council on Environmental Quality on the procedures and considered comments from interested parties, including numerous Federal agencies. Major changes and improvements have been made, and the revised procedures are now being issued in the form of HUD Handbook 1390.1, "Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality." These new procedures will facilitate and promote the Department's implementation of the National Environmental Policy Act of 1969.

On May 2, 1973 (38 FR 10856) the Council on Environmental Quality published proposed revised guidelines on the preparation of environmental impact statements. These proposed guidelines provide that, after they are made effective, each Federal agency shall revise its procedures to respond to requirements imposed by the revised guidelines.

Since the Department's new procedures will substantially improve implementation of its environmental responsibilities and will soon be further revised to comply with the revised CEQ Guidelines, comment and public procedure would be unnecessary and contrary to the public interest and good cause exists for making HUD Handbook 1390.1 effective upon publication.

Interested parties are invited to submit written comments concerning the revised procedures to the Rules Docket Clerk, Office of the General Counsel, Room 10256, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410.

(Sec. 7(d), Department of HUD Act; 42 U.S.C. 3535(d); sec. 102(2), National Environmental Policy Act of 1969; 42 U.S.C. 4332(2))

JAMES T. LYNN
Secretary of Housing
and Urban Development.

[1390.1]

DEPARTMENTAL POLICIES, RESPONSIBILITIES AND PROCEDURES FOR PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

HUD STAFF

Approved June 11, 1973.

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DEPARTMENTAL POLICIES, RESPONSIBILITIES AND PROCEDURES FOR PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

CHAPTER I—General Policy and Responsibilities

1 *Purpose and authority.* The National Environment Policy Act of 1969 (P.L. 91-190) establishes new national policy, goals and procedures for protecting and enhancing environmental quality. The act, effective January 1,

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[1] Filed as part of the original document. See 83 Stat. 852, 42 U.S.C. 4321 note.

[2] Filed as part of the original document. See 35 FR 4247, March 7, 1970.

[3] Filed as part of the original document. See 36 FR 7724, April 23, 1971.

[4] Filed as part of the original document. See 37 FR 24146, November 14, 1972.

[5] Filed as part of the original document. See 36 FR 8921, May 15, 1971.

1970, establishes the Council on Environmental Quality to set overall policies to implement the Act.

The National Environmental Policy Act (NEPA) directs the Federal government to use all practicable means, including financial and technical assistance, to implement the national policy. NEPA governs all Federal departments and agencies and requires systematic attention to the environmental consequences of all Federal activities.

The purposes of this Handbook are to set forth departmental environmental policy, to assign responsibilities, and to provide procedural guidance to all headquarters and field offices for environmental clearances under NEPA. The Handbook applies to HUD legislative proposals, policy and guidance documents (including guides, regulations, handbooks, circulars, technical standards, etc.), and individual project approval actions on insurance, loans and grants, subsidies and demonstration projects.

This Handbook is based on authority provided in:

a. The Department of Housing and Urban Development (HUD) Act of 1965 (P.L. 89-174) which provides that the Secretary may make rules and regulations as may be necessary to carry out his functions, powers, and duties, and sets forth, as a matter of national purpose, the sound development of the Nation's communities and metropolitan areas;

b. The National Environmental Policy Act of 1969 (P.L. 91-190) which establishes a comprehensive policy for protection and enhancement of environmental quality by the Federal Government, creates the Council on Environmental Quality (CEQ) in the Executive Office of the President and directs Federal Agencies to carry out the purposes of this Act;

* * *

2. *Terminology*—a. *Environment.* Environment is not defined in NEPA or in the CEQ Guidelines. However, it is clear from section 102 of the Act and elsewhere that the term is meant to be interpreted broadly to include physical, social, cultural, and aesthetic dimensions. Examples of environmental considerations are: air and water quality, erosion control, natural hazards, land use planning, site selection and design, subdivision development, conservation of flora and fauna, urban congestion, overcrowding, displacement and relocation resulting from public or private action or natural disaster, noise pollution, urban blight, code violations and building abandonment, urban sprawl, urban growth policy, preservation of cultural resources, including properties on the National Register of Historic Places, urban design and the quality of the built environment, the impact of the environment on people and their activities.

b. *Major Federal actions significantly affecting the quality of the human environment.* Those actions taken by a Federal agency which require Environmental Impact Statements in accordance with section 102(2)(C) of the National Environmental Policy Act. As HUD processes between 15,000 and 20,000 applications per year at the project level, not including insurance actions on individual houses, the three level environmental clearance process defined in this Handbook shall be used to determine which action is a major Federal action significantly affecting the quality of the human environment.

c. *Significant environmental impact.* For the purposes of this Handbook, the term "significant environmental impact" is used to describe the consequences of an ac-

tion significantly affecting the quality of the human environment. This term is defined to some extent in paragraph 5 of the CEQ Guidelines, but the definition in general is a matter of discretion delegated to agency heads for formulation of guidelines subject to the approval of CEQ.

d. *Environmental impact.* An environmental impact is any alteration of environmental conditions or creation of a new set of environmental conditions, adverse or beneficial, caused or induced by the action or set of actions under consideration. Assessment of the significance of the environmental impact generally involves two major elements: A quantitative measure of magnitude and a qualitative measure of importance. Such a determination is a matter of agency judgment and consensus; at the project level, this judgment shall be governed by HUD environmental policies and standards.

e. *HUD environmental policies and standards:* National, Departmental, and program objectives, policies, standards, and procedures. These include: (1) National environmental goals and policies as expressed in the National Environmental Policy Act, other statutes and Executive Orders listed in paragraph 1 above, and guidelines issued by the Council on Environmental Quality; (2) Department-wide standards and policies such as HUD Circular 1390.2; and (3) environmental considerations contained in program policy and guidance documents, including environment-related project selection criteria, minimum property standards, and environmental elements of program circulars, handbooks and other issuances. Further clarification will be provided with the revision of program policies, procedures, standards and criteria and/or issuance of the consolidated office-wide circulars or handbooks of environmental policies and standards as

provided in paragraph 4.c. (2).

f. *Major amendatory.* For the purposes of this Handbook, a significant change in the nature, magnitude or extent of the action from that which was originally evaluated and which may have a significant affect on the quality of the human environment, such as an environmentally significant change in location or site, area covered, size or design in which case they require environmental clearance. An increase or decrease in cost is considered a major amendatory only when the increase or decrease reflects such an environmentally significant change in the project.

g. *Threshold.* A criterion of size or of environmental impact above which a Special Environmental Clearance is always required. The threshold is designed to screen out the more important HUD actions for special attention. HUD thresholds are set forth in Appendix A-1 of this Handbook.

h. *Decision points.* Those points of Federal commitment in the decision-making process before which prescribed environmental clearances must be completed. HUD decision points are set forth in Appendix A-1 of this Handbook.

i. *Finding of inapplicability (negative statement).* A determination by an authorized HUD official, under the authority of the HUD Guidelines approved by CEQ, which are issued in accordance with the CEQ Guidelines implementing NEPA, that no Environmental Impact Statement is required for the proposed HUD action under consideration. The Finding of Inapplicability for project level actions is a part of the Special Environmental Clearance. The format for the Finding of Inapplicability for policy actions is set forth in Appendix F.

* * *

3. *General policy.* The national goal of "a decent home and a suitable living environment for every American family"—established by the Housing Act of 1949 and subsequently reaffirmed by Congress in 1968—is central to the mission of the Department of Housing and Urban Development (HUD). *The National Environmental Policy Act (NEPA) furthers this goal. While recognizing that adverse environmental impacts are sometimes unavoidable in pursuing other goals, NEPA requires that environmental values be given appropriate consideration in decision-making along with economic and technical factors.* The object is to achieve the optimum balance among competing needs and goals—not to stop the building of cities, but rather to build with foresight so that rational development is achieved with due regard for the capacity of natural and man-made systems and for the quality of life attained within the resulting environment.

In addition to the prevailing national emphasis on anti-pollution and conservation aspects, HUD is also concerned with the environment of urban areas and how it affects the quality of life. Efforts to improve the quality of the environment certainly involve the abatement and prevention of many annoying and threatening nuisances—air pollution, water pollution, land pollution, noise—which impinge on our daily living. But efforts to improve environmental quality also include more positive actions such as provision of open space, the development of aesthetically pleasing urban areas, provision of adequate access to employment and cultural opportunities, reductions in structural deficiencies, maintenance of high quality in new construction, and appropriate planning for the proper juxtaposition of spaces for various human activities.

a. It is the policy of the Department to reject pro-

posals which have unacceptable environmental impacts, based on HUD environmental policies and standards, which cannot be avoided, and to encourage modification of project proposals or plans in order to enhance environmental quality and minimize environmental harm. At each stage of the environmental clearance HUD officials shall work with the applicant to seek means for avoiding adverse environmental impact, maximizing environmental quality, and considering superior alternatives.

b. When environmental clearances reveal conditions or safeguards which should be implemented once a project is approved in order to protect and enhance environmental quality or minimize adverse environmental impacts, such conditions or safeguards shall be set forth as requirements in the contract, grant, or other documents which delineate the obligations of the recipient. The contractor's performance in meeting such conditions shall be monitored and evaluated as part of the normal project monitoring and evaluation.

c. Environmental impact shall be evaluated on as comprehensive a scale as is feasible, with a view to the overall cumulative impact of HUD actions and programs, as well as the project specific impacts of a particular proposal. Environmental factors shall be considered as early as possible in the review and decision-making process.

d. Section 102(2)(A) of the National Environmental Policy Act directs all agencies to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment." When making determinations regarding environmental impacts, HUD officials shall consult HUD professional

personnel, such as urban planners, landscape architects, civil engineers, sanitary engineers, architects, economists, demographers, sociologists, lawyers, and others who are qualified to provide advice on specialized and broad aspects of environmental concerns.

e. HUD officials shall continue to establish and review environmental policies, standards and procedures for administering HUD programs to promote environmental quality. HUD policies and procedures must be consistent with this Handbook.

* * *

CHAPTER 2—Environmental Clearances

5. *Environmental clearance policy on HUD actions.* The purpose of this section is to establish a procedure for determining whether a proposed HUD action is a "major Federal action significantly affecting the quality of the human environment", and whether the proposal should be accepted, rejected, or modified accordingly.

a. *General.* The procedure involves a three level environmental clearance process: Normal Environmental Clearance; Special Environmental Clearance; and Environmental Impact Statement Clearance.

Normal Clearance is essentially a consistency check with HUD environmental policies and standards and a brief evaluation of environmental impact. Special Clearance requires an environmental evaluation of greater detail and depth. Finally, an Environmental Impact Statement is the complete and fully comprehensive environmental evaluation, including formal review by other Federal, State and local agencies, as prescribed by section 102(2)(C) of NEPA.

Many HUD actions will be subject to a Normal Environmental Clearance. On the basis of that clearance, the proposed project shall be accepted, rejected, or modified accordingly. However, if, even after appropriate modification to mitigate environmental impacts, it is determined that there is potential significant environmental impact, Special Clearance procedures shall be initiated. If, after Special Clearance and the implementation of any changes mitigating environmental impacts, such impacts are still significant as a result of the action, an Environmental Impact Statement shall be prepared on the proposed action.

Not all proposed actions will undergo Normal Environmental Clearance. Some, because of their size or for other reasons, shall be processed directly through Special Clearance or Environmental Impact Statement Clearance. Projects which shall go directly through Special Clearance or Environmental Impact Statement Clearance are described in Appendices A and B-1.

All required environmental clearances shall be completed prior to the decision points described in Appendix A. The environmental clearance process is discussed further in Appendix B.

(1) *Exemptions.* Although HUD's general policy on environmental considerations applies to all HUD actions, the procedural requirements for environmental clearances set forth in this paragraph shall not apply to those HUD actions which have been determined not be "major Federal actions significantly affecting the quality of the human environment". These shall include an individual action on a one-to-four family dwelling, training grants, or rehabilitation and modernization projects which do not extend the life of a structure twenty (20) years or more. Exemptions from environmental clearances do not exempt these activities from the requirements of Section 106 of the National Historic Preservation Act of 1966 when a property is listed on, or nominated to, the Na-

tional Register of Historic Places. (See Appendix L for Advisory Council on Historic Preservation procedures.)

Planning assistance projects (701 Comprehensive Planning Assistance grants and other planning loans and grants) are exempted from the procedural requirements, but in lieu thereof an environmental assessment of the final planning product shall be required as part of the proposed planning program.

With respect to disaster relief and emergency activities of the Department, procedures for environmental clearance shall not apply to actions designed to meet the temporary housing needs of the affected population. Disaster activities which provide permanent housing and other recovery efforts will follow the environmental clearance procedures. However, where required by the serious nature of the situation and upon the approval of the Assistant Secretary for CPD, activities such as disaster related early land acquisition, clearance of damaged structures and relocation efforts may take place prior to the completion of the environmental review.

Except for these exemptions, all HUD actions must undergo one or more environmental clearances. (Emp. added)

(2) *Additional requirements.* The responsibilities and clearance requirements set forth in this paragraph represent minimum Departmental requirements. Regional Administrators and Area and Insuring Office Directors with the concurrence of the Regional Administrator have discretion to require such additional clearances and responsibilities as are deemed necessary for the effective implementation of this Handbook.

(3) *Controversy.* Decisions resulting from Normal or Special clearance shall give adequate consideration to existing or potential environmental controversy. Issues raised by opponents and supporters of the HUD actions

shall be carefully examined to determine whether the project involves significant environmental impacts. Major controversy which appears to raise substantive environmental issues is a factor which should contribute to a decision to undertake a more comprehensive environmental clearance procedure than would otherwise be initiated. For example, in the case of projects which would ordinarily require only Normal Clearance, major environmental controversy should weigh heavily in the decision to undertake a Special Clearance. Likewise for projects which normally require only Special Clearance, major controversy on environmental issues should weigh heavily in the decision to undertake Environmental Impact Statement Clearance.

(4) *Retroactivity.* To the maximum extent practicable, environmental clearance shall be required for uncompleted projects which have never gone through an environmental clearance under NEPA, at such time as a subsequent significant HUD action, such as the next stage of program approval or approval of a major amendatory, is proposed. Where it is not practicable to reassess the basic course of action, major attention should be given to measures, which, given the stage of project completion, may reduce adverse environmental impact. It is also important in taking further action that account be taken of environmental consequences not fully evaluated at the outset of the project.

(5) *Evaluation of comprehensive activities.* Individual actions that are related either geographically or as logical parts in a composite of contemplated actions may be more appropriately evaluated in a single environmental clearance. For example, several subdivisions may form a large new development. Likewise, a comprehensive project may be composed of, or include, several interrelated

activities, e.g., development of a new community or redevelopment of a center city area. In these cases, and where feasible, HUD offices should aggregate individual activities into a larger package and environmental evaluation shall concentrate on the broad and cumulative impacts of the larger activity, as well as the project specific impact of component activities to the extent known.

The comprehensive environmental evaluation will not satisfy the requirements of this Handbook, howeveer, if it is superficial or limited to generalities. When all significant issues cannot be anticipated or adequately treated in connection with the comprehensive assessment as a whole, environmental clearances of more limited scope will be necessary on subsequent, individual actions in order to fulfill the requirements of this Handbook.

Impacts of individual activities may be singularly limited but cumulatively considerable. One purpose of this provision, therefore, is to stimulate a more comprehensive environmental evaluation. In addition, there may be environmental impacts which are common to all or most components of the larger activity. A secondary purpose, therefore, is to eliminate duplicative evaluative efforts where possible. In no case shall this provision be interpreted to avoid a detailed examination of environmental impacts.

* * *

APPENDIX B

HUD Proposed Rules, 24 C.F.R. Part 50

Subpart B—Environmental Clearances on HUD Actions

§ 50.10 Purpose.

The purpose of this subpart is to establish a procedure for determining whether a proposed HUD action is a "major Federal action significantly affecting the quality of the human environment", and whether the proposal should be accepted, rejected, or modified accordingly.

§ 50.11 Environmental clearance process.

The procedure involves a three level environmental clearance process: Normal Environmental Clearance; Special Environmental Clearance; and Environmental Impact Statement Clearance. Normal Clearance is essentially a consistency check with HUD environmental policies and standards and a brief evaluation of environmental impact. Special Clearance requires an environmental evaluation of greater detail and depth. Finally, an Environmental Impact Statement is the complete and fully comprehensive environmental evaluation, including formal review by other Federal, State and local agencies, as prescribed by section 102(2)(C) of NEPA. Many HUD actions will be subject to a Normal Environmental Clearance. On the basis of that clearance, the proposed project shall be accepted, rejected, or modified accordingly. However, if, even after appropriate modification to mitigate environmental impacts, it is determined that there is potential significant environmental impact, Special Clearance procedures shall be initiated. If, after Special Clearance and the implementation of any changes mitigating environmental impacts, such impacts are still significant as a result of the action, an Environmental Impact Statement shall be prepared on the proposed action. The mere

mitigation of adverse effects does not indicate that a project has no significant impact; an Environmental Impact Statement may be required even though adverse effects have been mitigated. All required environmental clearances shall be completed prior to the decision points described in Appendix A.

(a) *Exemptions.* Although HUD's general policy on environmental considerations applies to all HUD actions, the procedural requirements for environmental clearances set forth in this subpart shall not apply to those HUD actions which have been determined not to be "major Federal actions significantly affecting the quality of the human environment". These shall include an individual action on a one-to-four family dwelling, training grants, or rehabilitation and modernization projects which do not extend the life of a structure twenty (20) years or more. Exemptions from environmental clearances do not exempt these activities from the requirements of section 106 of the National Historic Preservation Act of 1966 when a property is listed on, or nominated to the National Register of Historic Places.

(1) Planning assistance projects (701 Comprehensive Planning Assistance grants and other planning loans and grants) are exempted from the procedural requirements, but in lieu thereof an environmental assessment of the Final planning product shall be required as part of the proposed planning program.

(2) With respect to disaster relief and emergency activities of the Department, procedures for environmental clearance shall not apply to actions designed to meet the temporary housing needs of the affected population. Disaster activities which provide permanent housing and other recovery efforts will follow the environmental clearance procedures. However, where required by the serious nature of the situation and upon the approval of the

Assistant Secretary for CPD, activities such as disaster related early land acquisition, clearance of damaged structures, and relocation efforts may take place prior to the completion of the environmental review.

(3) *Except for these exemptions, all HUD actions must undergo one or more environmental clearances prior to the decision-points listed in Appendix A-1 to this part.* (Emp. added)

(b) *Limitation on actions pending clearance.* Pending preparation and completion of any environmental clearance, the appropriate HUD official may, after consultation with the Assistant Secretary for CPD or his designee, direct an applicant to refrain from taking any action with respect to a project which such official determines might have an adverse environmental effect or might so alter the environmental premises on which the clearance is based as to affect the validity of the conclusions reached. Such official may also direct the applicant to take such additional actions as he determines are necessary to preserve the status quo. The applicant shall promptly comply with all directions issued in accordance with this subsection.

(c) *Additional requirements.* The responsibilities and clearance requirements set forth in this subpart represent minimum Departmental requirements. Regional Administrators and Area and Insuring Office Directors with the concurrence of the Regional Administrator have discretion to require such additional clearances and responsibilities as are deemed necessary for the effective implementation of this part.

(d) *Controversy.* Decisions resulting from Normal or Special Clearance shall give adequate consideration to existing or potential environmental controversy. Issues raised by opponents and supporters of the HUD actions shall be carefully examined to determine whether the project involves significant environmental impacts. Major

controversy which appears to raise substantive environmental issues is a factor which should contribute to a decision to undertake a more comprehensive environmental clearance procedure than would otherwise be initiated. For example, in the case of projects which would ordinarily require only Normal Clearance, major environmental controversy should weigh heavily in the decision to undertake a Special Clearance. Likewise for projects which normally require only Special Clearance, major controversy on environmental issues should weigh heavily in the decision to undertake Environmental Impact Statement Clearance.

(e) *Retroactivity.* To the maximum extent practicable, environmental clearance shall be required for uncompleted projects which have never gone through an environmental clearance under NEPA, at such time as a subsequent significant HUD action, such as the next stage of program approval or approval of a major amendatory, is proposed. Where it is not practicable to reassess the basic course of action, major attention should be given to measures which, given the stage of project completion, may reduce adverse environmental impact. It is also important in taking further action that account be taken of environmental consequences not fully evaluated at the outset of the project.

(f) *Evaluation of comprehensive activities.* Individual actions that are related either geographically or as logical parts in a composite of contemplated actions may be more appropriately evaluated in a single environmental clearance. The comprehensive environmental evaluation will not satisfy the requirements of this part, however, if it is superficial or limited to generalities. When all significant issues cannot be anticipated or adequately treated in connection with the comprehensive assessment as a whole, environmental clearances of more limited

scope will be necessary on subsequent individual actions in order to fulfill the requirements of this part.

* * *

(h) *Environmental clearance forms.* Environmental clearance forms shall be used in conducting the required environmental clearance(s) for project level actions as directed in this part. Form ECO-1, completed by the applicant, shall be used by HUD principally as a source of factual information. An independent environmental assessment and evaluation shall be conducted by HUD on Form ECO-2 or Form ECO-3, or an Environmental Impact Statement shall be prepared. The completed clearances shall become part of the application file and shall accompany the proposal through the review and decision-making process.

(1) The Applicant's Environmental Information, Form ECO-1, shall be required of applicants for all project proposals except those exempted in § 50.11(a)(1). The applicant shall be provided with Form ECO-1 along with the required program application forms, and the environmental clearance requirements shall be explained in the earliest stages of contact and application preparation. The appropriate HUD official shall indicate to the applicant the initial level of environmental clearance required for the proposed project. The completed Form ECO-1 shall accompany A-95 notification where required. It shall be submitted to HUD with the completed application.

(2) After obtaining information from other sources, HUD shall evaluate and verify the information provided by the applicant on Form ECO-1. HUD may begin preparing the appropriate clearance worksheet at this time or may await the resolution of problems. The applicant shall be asked to modify or supplement Form ECO-1 as appropriate: If there is inadequate information,

the applicant shall be asked to supplement Form ECO-1 with documentation as necessary; if there are environmental problems, the applicant shall be asked to present solutions, modify the project, include measures to enhance environmental quality or reduce adverse environmental impacts, provide assurances and documentation as necessary, and amend or revise Form ECO-1 accordingly. HUD shall then complete the appropriate environmental clearance worksheet, or shall prepare the Draft Environmental Impact Statement.

(i) *Relationship Between A-95 procedures and environmental clearance procedures.* OMB Circular A-95 provides a mechanism for securing comments and views of State and local agencies regarding the impact, including environmental impact, of Federal and Federally-assisted projects. The A-95 requirements are coordinated, but not synonymous, with the requirements set forth in this part. Those programs or projects which are not subject to A-95 requirements are nevertheless subject to environmental clearance requirements unless specifically exempted in § 50.11(a)(1). The requirements of this part and OMB Circular A-95 shall be coordinated in the following manner:

(1) *Project Notification and Review System (PNRS).* The A-95 Project Notification and Review System requires that, for non-housing programs covered by Attachment D of the A-95 Circular, the applicant submit to the appropriate clearinghouses a notice of intent to file an application for Federal assistance. For housing projects exceeding A-95 thresholds listed in paragraph 7c of Attachment A and under programs listed Attachment D, HUD is required to send the application submitted by the applicant to the appropriate clearinghouses. Housing projects under A-95 thresholds are not subject to the A-95 requirements. Environmental clearances procedures

set forth in this part require that the applicant prepare Form ECO-1. For programs also covered by the A-95 Circular, such form shall accompany the A-95 submission.

(2) *Inclusion of A-95 Comments in Draft EIS.* A-95 review of a proposed project generally takes place prior to the preparation of an impact statement. Therefore, comments on the proposed project that are secured during this stage of the A-95 process must be included in the Draft EIS. The comments received from clearinghouses, or by State and local environmental agencies through clearinghouses, in the A-95 review shall be attached to the draft impact statement when it is circulated for review.

(3) *Review of environmental impact statement.* If an Environmental Impact Statement is required, HUD shall notify the appropriate A-95 clearinghouses of HUD's intent to prepare and file the Draft Statement. When the Draft Statement is distributed, HUD shall send copies of the Statement to the appropriate clearinghouses for review and comment, regardless of whether or not the subject proposal is covered by OMB Circular A-95. The clearinghouses shall also receive copies of the Final Statement for their information.

(j) *Updating environmental clearances.* Environmental clearances shall be updated by revision, amendment or addendum to the original clearance, if:

(1) Additional information with significant implications for environmental impact or additional environmental impacts not previously considered is discovered during the review process. Actions which went through Normal or Special Environmental Clearance shall be updated by revision, amendment or addendum to the original environmental clearance worksheet. A new finding shall then be made on the basis of all information,

and action taken accordingly. For actions for which a Draft and Final Environmental Impact Statement was prepared and distributed, the Final Statement shall be revised and reissued, or an addendum to the Statement shall be prepared and distributed. Such revision or addendum shall be subject to the same review and comment procedures as was the original Final Statement.

(2) Major amendatories are proposed. For major amendatories, the type and extent of environmental clearance required shall depend on the type, size and scale of the proposed action as amended. If an EIS is prepared for the amendatory, it shall be prepared and processed pursuant to § 50.14.

(3) HUD approval action is required for component activities whose environmental impacts were not addressed in sufficient detail in original environmental clearance for the larger action. Such clearance shall focus on the environmental impact of the specific project and site and need not treat the environmental impact on the more comprehensive level addressed in the original Environmental Impact Statement. A finding shall then be made as to the significance of the environmental impact of the specific project activity, and action taken accordingly. If an Environmental Impact Statement is prepared for the component activity, it shall be prepared and processed pursuant to § 50.14.

§ 50.12 Normal environmental clearance.

Normal Environmental Clearance shall be required for HUD actions for which it is not immediately evident that Special Environmental Clearance or Environmental Impact Statement Clearance is required. Normal Environmental Clearance is a consistency check with HUD environmental policies and standards and a brief evaluation of environmental impact. Information shall be requested

from the applicant on Form ECO-1 and gathered from other sources as appropriate. After modifications to the proposal to mitigate environmental impacts as necessary, HUD shall conduct an independent assessment and evaluation on Form ECO-2.

(a) *Responsibility for clearance.* Responsibility for Normal Environmental Clearance shall rest with the Area/Insuring Office program staff. An information copy shall be sent to the ECO.

(b) *Action resulting from clearance.*

(1) If after appropriate modifications to the proposal there exist environmental impacts which are unavoidable, and, based on HUD environmental policies and standards, such impacts are also considered unacceptable, then the proposal shall be rejected.

(2) If there is no significant environmental impact, processing of the proposal may proceed. Conditions or safeguards found to be necessary in order to protect and enhance environmental quality or minimize adverse environmental impacts shall be set forth in the contract, grant, or comparable document.

(3) If after appropriate modifications to the proposal to mitigate environmental impacts, there remains significant or potentially significant environmental impact, Special Environmental Clearance or EIS, as appropriate, is required. The mere mitigation of adverse effects does not indicate that a project has no significant impact; an EIS may be required even though adverse effects have been mitigated.

§ 50.13 Special environmental clearance.

Project level actions found to require Special Environmental Clearance by virtue of their size or scale (in relation to the thresholds in Appendix A-1 to this part) or other characteristics indicating significant en-

vironmental impact, or as a result of Normal Environmental Clearance, shall be subject to the requirements in paragraph (a) of this section. Proposed legislation, regulations, policy issuances, guidance documents, and revisions to such regulations and documents, which may have significant environmental impact, shall be required to undergo the Special Environmental Clearance for policy actions as set forth in paragraph (b) of this section.

(a) Project level actions. Special Environmental Clearance for project level actions is a preliminary version of the analysis required in the Environmental Impact Statement. It provides the HUD official with a factual basis for determining whether the proposed action has a significant environmental impact and hence, whether it should be approved, rejected, or modified, or whether an Environmental Impact Statement is required. Information required shall be requested from the applicant on Form ECO-1 and gathered from other sources as appropriate. After modifications to the proposal to mitigate environmental impacts as necessary, HUD shall conduct an independent assessment and evaluation. On the basis of this assessment an environmental finding shall be made and accompany the application through the review process.

* * *

(2) *Action resulting from clearance.*

(i) If after appropriate modifications to the proposal, there exist environmental impacts which are unavoidable, and, based on HUD environmental policies and standards, such impacts are also considered unacceptable, then the proposal shall be rejected.

* * *

(iii) If after appropriate modifications to the proposal to mitigate environmental impacts, there remains

significant or potentially significant environmental impact, an Environmental Impact Statement shall be prepared. The mere mitigation of adverse effects does not indicate that a project has no significant impact; an EIS may be required even though adverse effects have been mitigated.

* * *

§ 50.14 Environmental impact statement clearance.

Environmental Impact Statement Clearance shall be required for all major HUD actions significantly affecting the quality of the human environment.

(a) *Environmental impact statement.* The Environmental Impact Statement is comprised of two stages, Draft and Final.

(1) *Notice of intent to file an environmental impact statement.* As soon as practicable after a determination is made that a HUD action will require the preparation and circulation of an environmental impact statement, a Notice of Intent to File shall be prepared to inform the public and to solicit comments that may be helpful in preparing the statement. Copies of this notice shall be sent to local newspapers, groups known to be interested in the agency's activities, the chief executive of the general unit of local government, local and State agencies, A-95 clearinghouses, the Assistant Secretary for CPD, the RO and CO-ECOs, and the RO Public Information Officer. When the appropriate HUD official determines that an environmental impact statement is not necessary, a Notice of Intent Not To File an EIS shall be prepared to inform the public under the following circumstances:

(i) HUD has previously announced the action would be the subject of an environmental impact statement; or

(ii) HUD has made a Finding of Inapplicability in response to a request from CEQ for the preparation and

circulation of an EIS.

The notice shall include a statement of the reasons for this decision. This determination and the reasons for the decision shall be prepared and disseminated in the same manner as a Notice of Intent to File an EIS.

* * *

(d) *Action resulting from clearance.* Based on the Environmental Impact Statement clearance, including comments and suggestions by other agencies and interested parties, HUD shall attempt to mitigate adverse environmental impacts to the extent practicable. If there remain adverse environmental impacts which are unavoidable, and based on HUD environmental policies and standards, such impacts are also considered unacceptable, the proposal shall be rejected. Otherwise, unavoidable adverse environmental impacts shall be weighed against benefits to be obtained from approval of the proposal. Where environmental costs which would be incurred outweigh such benefits, the proposal shall be rejected. Where benefits of the proposal outweigh environmental costs, processing may proceed; conditions or safeguards found to be necessary in order to protect and enhance environmental quality or minimize adverse environmental impacts shall be set forth in the contract, grant, or comparable document.

APPENDIX C

Title 24—Housing and Urban Development

Subpart B—Delegations of Basic Authority and Functions

§ 1700.80 Director of the Examination Division, Office of Interstate Land Sales Registration, and Deputy.

To the position of Director of the Examination Division, Office of Interstate Land Sales Registration, and under his supervision to the position of Deputy Director there are delegated and assigned the following authorities and responsibilities.

(a) To receive and examine all statements of record and property reports filed under the provisions of the Interstate Land Sales Full Disclosure Act and all amendments and corrections to such statements.

(b) To determine the adequacy of disclosure of statements of record and property reports and amendments thereto and to effect corrections, additions, and deletions in such statements and reports deemed necessary to achieve the purposes of the Interstate Land Sales Full Disclosure Act.

(c) To find effective or to recommend to the Administrator that he declare not effective statements of record filed under the Interstate Land Sales Full Disclosure Act and to prepare and present evidence in connection with hearings and other administrative proceedings relative to statements of record declared not effective.

* * *

§ 1710.45 Suspensions.

(a) *Suspension notice—prior to effective date.*—(1) A suspension notice with respect to a Statement of Record or an amendment may be issued to a developer by the

Secretary within 30 days after the date of filing if prior to its effective date, the Secretary has reasonable grounds to believe that a Statement of Record is on its face incomplete or inaccurate in any material respect; or prior to its effective date, the Secretary has reasonable grounds to believe that an amendment is on its face incomplete or inaccurate in any material respect.

(2) Suspension notices issued pursuant to this subsection shall suspend the effective date of the statement or the amendment until 30 days, or such earlier date as the Secretary may determine, after the developer files such additional information as the Secretary shall require

(3) A developer, upon receipt of a suspension notice may request a hearing within 15 days of receipt of such notice. Such hearing shall be held within 20 days of receipt of such request by the Secretary.

(4) Suspension notices issued pursuant to this section shall continue in effect until all deficiencies cited in the notice are corrected.

(b) *Suspension orders—subsequent to effective date.*—(1) A notice of proceedings to suspend an effective Statement of Record may be issued to a developer if the Secretary has reasonable grounds to believe that an effective Statement of Record includes an untrue statement of a material fact, or omits a material fact required by the Act or the rules and regulations, or omits a material fact which is necessary to make the statements therein not misleading. The Secretary may, after notice, and after opportunity for a hearing requested within 15 days of receipt of such notice, issue an order suspending the Statement of Record. In the event that a suspension order is issued, such order shall remain in effect until the developer has amended the Statement of Record or otherwise complied with the requirements of the order.

When the developer has complied with the requirements of the order, the Secretary shall so declare and thereupon the suspension order shall cease to be effective.

(2) If the Secretary undertakes an examination of a developer or his records to determine whether a suspension order should be issued, and the developer fails to cooperate with the Secretary or obstructs, or refuses to permit the Secretary to make such examination, the Secretary may issue an order suspending the Statement of Record. Such order shall remain in effect until the developer has complied with the requirements of the order. When the developer has complied with the requirements of the order, the Secretary shall so declare and thereupon the suspension order shall cease to be effective.

(3) Upon receipt of an amendment to an effective Statement of Record, the Secretary may issue an order suspending the Statement of Record until the amendment becomes effective if he has reasonable grounds to believe that such action is necessary or appropriate in the public interest or for the protection of purchasers.

(4) Suspension orders issued pursuant to this subsection shall operate to suspend the Statement of Record as of the date the order is either served on the developer or his registered agent or is delivered by certified or registered mail . . .

* * *

As to the "not misleading" requirement, see Instruction A(2) of the Instructions for Completion of the Statement of Record, 24 C.F.R. Sec. 1710.105, which requires that

> "in addition to the information expressly required to be stated in the statement of record, there shall be added such further material information, documentation and certification, *if any, as may be neces-*

sary in the public interest and for the protection of purchasers or necessary in order to make the statements in the light of the circumstances under which they are made, not misleading.

APPENDIX D

5th Annual Report of C.E.Q. (pp. 21-26, 489-90)

* * *

Leisure Homes and Recreational Development

As incomes and leisure time have increased over recent years, there has been a growing demand for recreational facilities in rural areas. Out of this demand have come the phenomena of leisure home and recreational lot developments—high density developments in rural settings. These phenomena create the same types of costs as the forms of urbanization described above. With recreational developments, in fact, the long-term costs of development to both property owners and the public may be greater than in most urban areas, and there may be more urgent need for effective controls.

Leisure home developments, of course, are not a new phenomenon. The Florida east coast, Cape Cod, Estes Park, and Lake Tahoe have been the sites of second home construction for many decades. Originally, these homes were owned almost exclusively by wealthier Americans, and houses were often expensive and built on large sites.

The more recent boom in second homes and recreational lots has involved a far broader stratum of society. Increased affluence has given more Americans the opportunity and desire to obtain such properties for themselves. This, combined with a widespread belief in the profitability of investment in land and reinforced by favorable income tax laws, has provided the ingredients for the recreational land and leisure home boom. The lots are smaller, the houses are more spare than traditional summer homes, and demand is many times greater than it was even a few years ago. Today approximately

3.4 million American families own second homes. Including owners of recreational lots, a total of 5 to 7 million American families are estimated to own recreational properties of some kind.

Table 4 presents a number of characteristics of households owning leisure homes. It shows clearly that these homes are no longer the province of the very wealthy. They are owned by families somewhat wealthier and somewhat older than the average but still comprising essentially a cross section of society. (Corresponding information about owners of recreational lots is not available, although there is evidence that they tend to be less affluent.)

The material on leisure homes and other recreational properties was obtained from a study on leisure homes undertaken by the American Society of Planning Officials for the Council on Environmental Quality in association *with the Department of Housing and Urban Development* and the Appalachian Regional Commission. The study indicates the importance of distinguishing between two separate aspects of the phenomenon: (1) the purchase of recreational lots, which are usually part of large subdivisions of plotted land where few of the lots may ever be developed; and (2) the ownership of leisure homes, which may be built by the owner in a subdivision or on a separate site, or built in large numbers by a developer.

Recreation lot sales often result from mail solicitation or telephone calls, and many buyers sign sales contracts without ever seeing the land. The Interstate Land Sales Act requires most lot sales in interstate commerce to be registered with the Office of Interstate Land Sales at the Department of Housing and Urban Development. Table 5, showing the regional breakdown of projects so registered, and Table 6, showing leisure homes by region,

Table 4

Selected Characteristics of U.S. Leisure Home Owners and Total U.S. Population

Characteristic	Percent of all households	Percent of leisure home owners	Leisure home owners as a percent of total households
Annual family income			
Less than $5,000	29.4	18.8	2.9
$5,000 to $9,999	30.9	24.5	3.6
$10,000 to $14,999	22.6	23.7	4.7
$15,000 to $24,999	13.2	20.9	7.2
$25,000 or more	3.9	12.1	14.1
Value of primary home			
Less than $15,000	41.3	31.3	3.4
$15,000 to $19,999	20.2	17.8	4.0
$20,000 to $24,999	14.7	13.5	4.1
$25,000 to $34,999	14.1	18.1	5.8
$35,000 to $49,999	6.5	10.7	7.4
$50,000 or more	3.2	8.6	12.2
Tenure of primary home			
Owned	59.3	73.1	5.6
Rented	35.4	22.7	2.9
Co-op or condominium	0.5	1.1	11.0
Other	4.8	3.1	2.9
Primary residence			
Inside SMSAs	69.1	68.0	4.4
Central city	34.1	31.0	4.1
Urban balance	24.7	26.2	4.8
Remainder	10.4	10.8	4.7
Outside SMSAs	30.9	32.0	4.7
Urban	75.1	75.2	4.5
Rural	24.9	24.8	4.5
Rural–nonfarm	20.0	20.3	4.6
Rural–farm	4.9	4.5	4.1
Places 10,000 to 50,000	20.4	21.9	4.8
Age of head of household			
Less than 25 years	7.1	4.0	2.5
25 to 34 years	21.0	10.0	2.1
35 to 44 years	21.2	18.5	3.9
45 to 54 years	20.1	25.9	5.8
55 to 64 years	17.5	22.7	5.9
65 years or older	13.1	18.9	6.5
Family size			
1 person	17.6	13.3	3.4
2 persons	29.6	35.0	5.3
3 persons	17.2	18.1	4.7
4 or 5 persons	25.2	24.8	4.4
6 or more persons	10.4	8.8	3.8

Source: Richard L. Ragatz Associates, *Recreational Properties: An Analysis of the Markets for Privately Owned Recreational Lots and Leisure Homes* (Springfield, Va.: National Technical Information Service, 1974).

Table 5

Recreational Properties Registered with the Office of Interstate Land Sales

	Acres in projects		Lots in projects	
	Total	Per 100 acres of region's area	Total	Per 100 families in region
United States	**7,146,229**	**0.5**	**3,375,821**	**5.3**
Northeast	**231,555**	**0.2**	**133,671**	**0.9**
New England	77,251	0.2	36,766	1.0
Middle Atlantic	154,304	0.2	96,905	0.8
North Central	**279,214**	**0.1**	**224,886**	**1.3**
East North Central	168,634	0.1	132,389	1.1
West North Central	110,580	0.04	92,497	1.8
South	**3,370,140**	**1.0**	**2,037,908**	**10.6**
South Atlantic	2,243,119	1.4	1,113,146	11.8
East South Central	127,291	0.1	123,022	3.2
West South Central	999,730	0.4	801,740	13.5
West	**3,265,320**	**0.8**	**979,356**	**8.8**
Mountain	2,489,408	0.9	750,270	29.8
Pacific	775,912	0.6	229,086	2.6

Source: Richard L. Ragatz Associates, *supra* Table 4, pp. 84, 87, 500.

Table 6

U.S. Leisure Homes by Region, 1970

Region	Total housing units	Leisure homes [1]	Percent of all housing units in region	Percent of all leisure homes in United States
United States	**68,418,094**	**2,143,434**	**3.1**	**100.0**
Northeast	**16,641,954**	**556,790**	**3.4**	**26.0**
New England	4,031,531	221,806	5.5	10.4
Middle Atlantic	12,610,423	334,984	2.7	15.6
North Central	**19,018,773**	**667,148**	**3.5**	**31.1**
East North Central	13,323,755	421,225	3.2	19.7
West North Central	5,695,018	245,923	4.3	11.5
South	**20,730,508**	**631,242**	**3.0**	**29.5**
South Atlantic	9,970,059	287,374	2.9	13.4
East South Central	4,184,006	127,039	3.0	5.9
West South Central	6,576,443	216,829	3.3	10.1
West	**12,026,859**	**288,254**	**2.4**	**13.5**
Mountain	2,762,783	115,901	4.2	5.4
Pacific	9,264,076	172,353	1.9	8.0

[1] "Leisure Homes" are enumerated by combining the Bureau of the Census categories "Rural Seasonal Vacant" and "Other Rural Vacant." This combination basically includes housing units which are intended for occupancy during only certain seasons of the year.

Source: Richard L. Ragatz Associates, *supra* Table 4, p. 91.

indicate a heavy concentration of lots in the South and in the West. Six states—Florida, Texas, California, New Mexico, Arizona, and Colorado—contain over 80 percent of the acreage in registered recreational lot sales projects.

These figures demonstrate that recreational land and leisure home developments have become very important in the United States. With them have come a host of problems. Some problems are consumer-related, such as fraudulent advertising and high pressure sales tactics used to take advantage of naive buyers. Attempts are being made to curb these unethical practices through implementation of the Interstate Land Sales Act at the Federal level and through similar laws in some states.

Other problems arise because such development brings what amounts to instant urbanization to rural communities—communities where local governments have little experience with the impacts of large-scale development and few land use controls or regulatory bodies to deal with them.

Many leisure homes are being built in subdivisions that differ little in appearance from typical middle income suburban developments. Yet they are often built to much lower standards. If the home remains a summer weekend retreat, this may not create serious problems. But experience shows that seasonal homes are often converted into year-round homes and leisure home developments into permanent communities. This process may take a few years or decades, depending on the proximity of the homes to urban employment areas. In the mountains of northern Virginia, some homes in recreational subdivisions are being occupied as first homes from the time they are built, with their occupants commuting two hours or more to jobs on the fringes of Washington and Baltimore. School buses can be seen serving these developments

soon after the first houses go up. In short, the leisure home subdivision of today is likely to become the permanent settlement or suburb of tomorrow and should be viewed as an early form of urbanization.

This being true, it is necessary for a community to consider very carefully what development standards are appropriate for these subdivisions, particularly in communities with little growth experience, where officials are not equipped to cope with rapid growth and change. Many rural communities initially welcome second home developments in the expectation that they will provide property tax revenue and income for the local economy. They usually do, but they also create costs. Local governments often end up bearing the cost of increased demands the developments place on such public services as fire and police protection, road maintenance, water supply, solid waste disposal, and sewers. As long as recreational subdivisions remain seasonally occupied, these costs are likely to be lower than the property tax revenues generated by the development. However, as soon as residences become permanent, costs to the host communities will rise rapidly as schools, medical facilities, and other public services are required.

The eventual public costs will be particularly high if the development was originally built to low standards. Septic fields may have to be replaced by a sewer system; poorly constructed roads may have to be rebuilt. Replacing such facilities is very expensive, often more expensive than building adequate facilities at the time of the initial development.

Now only will the costs of low quality development be higher to the government, but they will also be higher to the homeowners. Inadequate insulation, poor drainage, and insufficient heating capacity may be small

problems during summer weekends, but they become major concerns at other times of the year.

The developments may also create serious environmental problems, although many of these can be avoided by careful design and review. Inadequate septic systems can pollute streams or aquifers and thus cause public health problems. Serious erosion can clog streams with silt. Demand for water can overtax local supplies. These environmental problems can cause particular difficulty because the most desirable sites for recreational developments are often in fragile environments unsuitable for housing development, such as steep mountain slopes, coastal dunes, or marshes.

In addition to such environmental problems, the developments also present potential conflicts with public recreational goals. The crowding of seasonal homes along the coast or around the shore of a lake often denies access to those resources for public recreation. And developing land adjacent to national parks and forests guarantees the owners that they will always have ready access to natural areas, but it prohibits the later expansion of public land holdings for the benefit of the general public.

Many of these problems are very similar to those faced in urban areas. The CEQ's study of second homes, mentioned above, will attempt to help rural communities in dealing with proposed developments. One specific product of the study is an impact evaluation handbook for local officials to use in assessing the costs and benefits of proposed recreation developments.

* * *

Leisure Homes Study

The Council, in association with the Department of Housing and Urban Development and the Appalachian

Regional Commission has sponsored an 18-month study of leisure home and similar recreational land projects. The study was conducted by the American Society for Planning Officials with the Conservation Foundation, the Urban Land Institute, and Professor Richard Ragatz of the University of Oregon as subcontractors. Some of the results of this study are discussed in Chapter 1 of this Annual Report.

The first part of the study involved an extensive analysis of the market for recreational properties. Using several new sources of data, this analysis summarizes what is known about the number and location of lots developed, homes built, projects started, facilities provided, and about the developers and owners of these properties. This analysis also includes regional projections of recreational developments.

The second part of the study involves an analysis of the economic environmental, social, and political impacts of leisure homes and certain other types of recreational developments on the localities and regions in which they occur. This analysis is based on an extensive review of previous research on leisure home development as well as a number of case studies undertaken by the research team. As mentioned in Chapter 1, the study concludes that leisure homes are over time converted into permanent residences and therefore should be viewed as a special form of early urbanization which generates the same types of economic, environmental, and social impacts as other residential developments. Further, leisure home developments may create more serious environmental problems than most residential developments because they often take place where there are few effective land use controls and are often built to lower standards and in less suitable environments—for example, on

mountainsides or in wetlands—than normal surburban subdivisions.

In terms of their economic impact on the local government, the study finds that as long as they are used only for recreational purposes, leisure homes usually generate tax revenues in excess of the costs of the public services required. However, as the developments become converted to permanent homes, these costs may exceed the tax payments, particularly if conversion results in a need for public investment to upgrade or replace roads, water supplies, and sewers.

Private recreational developments may also create social problems resulting from the impact of outsiders on the local culture and the way such developments interfere with the public's use of valuable recreational environments.

Finally, the study analyzes and recommends local, state, and Federal legislative mechanisms for mitigating the various adverse impacts that the developments may generate.

The results of the study will be published by CEQ and HUD. One volume will summarize the findings of the study, and a second volume will be a handbook for use by local officials in reviewing and evaluating the probable impacts of proposed projects.

APPENDIX E

15 U.S.C. § 1705

(12) such other information and such other documents and certifications as the Secretary may require as being reasonably necessary or appropriate for the protection of purchasers.

§ 1706. Effective date of statements of record and amendments thereto—Thirtieth day after filing or such earlier date as determined by Secretary; consolidation of subsequent statement with earlier recording

(a) Except as hereinafter provided, the effective date of a statement of record, or any amendment thereto, shall be the thirtieth day after the filing thereof or such earlier date as the Secretary may determine, having due regard to the public interest and the protection of purchasers. If any amendment to any such statement is filed prior to the effective date of the statement, the statement shall be deemed to have been filed when such amendment was filed; except that such an amendment filed with the consent of the Secretary, or filed pursuant to an order of the Secretary, shall be treated as being filed as of the date of the filing of the statement of record. When a developer records additional lands to be offered for disposition, he may consolidate the subsequent statement of record with any earlier recording offering subdivided land for disposition under the same promotional plan. At the time of consolidation the developer shall include in the consolidated statement of record any material changes in the information contained in the earlier statement.

Incomplete or inaccurate statements of record

(b) If it appears to the Secretary that a statement of record, or any amendment thereto, is on its face incom-

plete or inaccurate in any material respect, the Secretary shall so advise the developer within a reasonable time after the filing of the statement or the amendment, but prior to the date the statement or amendment would otherwise be effective. Such notification shall serve to suspend the effective date of the statement or the amendment until thirty days after the developer files such additional information as the Secretary shall require. Any developer, upon receipt of such notice, may request a hearing, and such hearing shall be held within twenty days of receipt of such request by the Secretary.

Amendment of statement of record

(c) If, at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement, the developer shall promptly file an amendment thereto. Upon receipt of any such amendment, the Secretary may, if he determines such action to be necessary or appropriate in the public interest or for the protection of purchasers, suspend the statement of record until the amendment becomes effective.

Suspension of statement of record containing untrue statement or omission to state material fact; notice and hearing; termination of order of suspension

(d) If it appears to the Secretary at any time that a statement of record, which is in effect, includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Secretary may, after notice, and after opportunity for hearing (at a time fixed by the Secretary) within fifteen days after such notice, issue an order suspending the statement of record. When such statement has been amended in

accordance with such order, the Secretary shall so declare and thereupon the order shall cease to be effective.

* * *

§ 1707. Information required in property report; use for promotional purposes

(a) A property report relating to the lots in a subdivision shall contain such of the information contained in the statement of record, and any amendments thereto, as the Secretary may deem necessary, but need not include the documents referred to in paragraphs (7) to (11), inclusive, of section 1705 of this title. A property report shall also contain such other information as the Secretary may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of purchasers.

* * *

CERTIFICATE OF SERVICE

I, Andrew T. Dalton, Jr., a member of the bar of the United States Supreme Court, certify that I mailed a copy of this brief to Mr. Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530, and to Mr. F. Paul Thieman, Jr., Crowe & Thieman, 5800 East Skelly Drive, Tulsa, Oklahoma 74135, and to Hon. Toney Anaya, Attorney General of New Mexico, Box 2246, Sante Fe, New Mexico 87503 this _____ day of February, 1976.

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Andrew T. Dalton, Jr.